

THE DEVELOPMENT OF THE ENGLISH LAW OF CONSPIRACY

BY
JAMES WALLACE BRYAN

A DISSERTATION

Submitted to the Board of University Studies of The Johns
Hopkins University in conformity with the requirements
for the degree of Doctor of Philosophy
1908

BALTIMORE

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PREFACE.

The following pages contain the results of a study of the English law relating to criminal conspiracy, begun in the spring of 1906, and continued with little interruption until May, 1908. The author's purpose has been to present an exhaustive discussion of the subject based upon an examination of all the available material extant. Accordingly, he has considered every relevant statute and case, from the earliest to the latest, which a careful search through ancient and modern law writings has enabled him to bring to light.

There is scarcely a more complex topic in the entire domain of British national jurisprudence than that of illegal combinations. The law relating to them has been more than ordinarily the creature of accident and special conditions. The resultant contradiction and confusion introduced into the cases renders extremely difficult the task of extracting the underlying principles, tracing their rise and growth, and giving an intelligible account of the causes which have determined their subsequent history.

The author desires to acknowledge his indebtedness to Professor W. W. Willoughby for the inspiration which made the work possible, as well as for his helpful suggestions and unfailing friendly interest.

THE DEVELOPMENT OF THE ENGLISH LAW OF CONSPIRACY.

CHAPTER I.

ORIGIN AND EARLY HISTORY OF THE ENGLISH LAW OF CONSPIRACY TO THE END OF THE REIGN OF EDWARD I.

Our first definite and reliable information regarding the conception of conspiracy in English law is found in several ordinances and statutes passed during the reign of Edward I. This fact has accordingly led some authorities, notably Mr. Justice Wright, to believe that the crime of conspiracy was created by these enactments. Others are equally emphatic in claiming for the offense a common-law origin antedating the statutes, and a scope extending far beyond the limits marked out by them. It will be our duty, therefore, to examine the grounds of this conflict of opinion and to endeavor to find out the real truth of the matter. This we shall do by setting out what is known of the law of conspiracy before the passage of the Edwardian statutes, and then discussing the effects which these acts appear to have really produced.

The statutes bear internal evidence that they are intended to deal with an offense not entirely unknown to the law. Not until the third statute is the attempt made to define conspiracy. The first Ordinance of Conspirators, anno 21 Edward I, provides a remedy against "conspirators, inventors and maintainers of false quarrels and their abettors and supporters and having part therein, and brokers of debates." The *Articuli super Chartas*, 28 Edward I, Stat. 3, C. 10, is no more explicit in its mention of "conspirators, false informers, and evil procurers of dozens, assizes, in-

quests and juries." It is obvious that the execution of these acts with justice and uniformity would have been impossible in the absence of an already existing body of custom supplying a more or less accurate description of the offense denounced. An even clearer reference to extra-statutory legal principles relating to conspiracy seems to be embodied in a clause in the famous Definition of Conspirators, 33 Edward I (1304), directing "that justices assigned to the hearing and determination of felonies and trespasses should have the transcript hereof." Since, as we shall see, the two former statutes had provided only civil remedies against conspirators, the criminal liability evidenced by the Definition's being supplied to the criminal justices could have arisen only from the common law.¹

The inference that the law had begun at a very early period to take cognizance of the special dangers to be apprehended from concerted evil-doing is supported by positive testimony. Thus, we find that plotting against the life of the king or of a lord was punished by the Anglo-Saxon laws.² Passing to a later period, we are shown in the record of the Shropshire Eyre for the year 1221 a case strikingly similar to a modern boycott.³ The word "conspirator" is first met in the Mirror of Justices,⁴ written between the years 1285 and 1290. In the chapter entitled "The View of Frankpledge," hundredors are directed to

¹ This conclusion is strengthened by the fact that the "villanous judgment," subsequently rendered against conspirators convicted at the suit of the king, is given by no statute, and was believed by Lord Coke and Serjeant Hawkins to have been derived from the common law. Coke, 3 Inst., Cap. 66, p. 143; Cap. 101, p. 222; Hawkins, Pleas of the Crown (Ed. 1762), Bk. I, Ch. 72, f. 193.

² Laws of King Alfred, Ch. 4; Laws of King Aethelstan, Ch. 4.

³ The Abbot of Lilleshall complained to the justices of gaol delivery "that the bailiffs of Shrewsbury do him many injuries against his liberty and that they have caused proclamation to be made in the town that none be so bold as to sell any merchandise to the Abbott or his men upon pain of forfeiting ten shillings, so that Richard Peche, the bedell of the said town made this proclamation by their orders." The defendants all denied the charge; but the "bedell" was ordered to defend himself by the oaths of eleven compurgators. The abbot, however, "remitted the law." Select Pleas of the Crown (Selden Soc.).

⁴ Mirror of Justices (Selden Soc. Pub.), Ch. 17.

assemble once a year all the men of their hundreds in order to inquire of the various "sins against the holy peace;" among them, "of conspirators, and all other articles which may avail for the destruction of sin." Britton⁵ includes in his discussion of pleas of the crown a chapter upon certain conspiracies or "alliances" to the hindrance of justice; and Bracton⁶ makes mention of the offense of "conspiracy" by name.

These passages, all of which antedate the passage of the first Ordinance of Conspirators in 1294, clearly evidence a conception of conspiracy which had attained to some growth in the virgin soil of the common law quite independently of the Edwardian statutes.⁷

While claiming for conspiracy an origin in extra-statutory law, however, we must be careful to avoid the common error⁸ of holding that the ancient law had developed a conception of the offense in any degree as advanced as that which we have today. The modern law upon the subject is the result of a painful course of evolution lasting many centuries. It has been gradually worked out by the interaction of statutory enactment with judicial elaboration, guided by the circumstances of its history. In order to tell the story of its evolution, therefore, we must examine the condition of the law relating to unlawful combinations as it stood just before the passage of the statutes.

At this period the law had already assumed the aspect which it was to exhibit for some time afterward. Conspiracy was limited to combinations whose object was to hinder or pervert the administration of justice. Explicit in-

⁵ Britton (Nichols Ed.), p. 79.

⁶ De Legibus et Consuetudinibus Angliæ (Twiss Ed.), Vol. 2, pp. 335-7.

⁷ Noteworthy also is the absence of any but a single statement (see argument of counsel in *Y. B. 3 Edw. II, f. 81r*) in the ancient writings that conspiracy originated in these statutes. On the other hand, references by counsel, court and commentator to the common-law origin of the offense, in the later Year Books and in the later authorities, are found in abundance.

⁸ Strikingly exemplified in *State vs. Buchanan*, 5 H. & J. 317, the leading American case upon conspiracy.

formation upon this subject is derived from Britton.⁹ In the passage previously referred to, he says: "Let it be also inquired concerning confederacies between the jurors or any of our officers, or between one neighbor and another, to the hindrance of justice; and what persons of the county procure themselves to be put upon inquests and juries and who are ready to perjure themselves for hire or through fear of any one; and let such persons be ransomed at our pleasure and their oath never after be admissible." It is an offense of the same narrow scope which is pictured in the statutes of Edward and in the great majority of the early cases in the Year Books.¹⁰

It is not probable that the courts of the period under examination ever took cognizance of conspiracies to commit the more serious crimes, such as murder, robbery, arson, and other felonies. During the reigns between the Norman Conquest and the accession of Edward I crime was exceedingly rife. Civil war was common. The country swarmed with outlaws, who rendered life and property insecure and

⁹ Op. cit., Bk. I, Ch. 22.

¹⁰ We can readily conjecture why the fact should be so. From the very earliest times the law of England had always been particularly severe in denouncing false accusations in a court of justice, and the newly founded supremacy of the royal over the communal courts, which had become nearly complete during the reigns of Henry III and Edward I, doubtless heightened the enormity of these offenses. The improved methods of procedure in the king's courts, the increase in litigation caused by the restoration of order and the establishment of a regular judicature, and especially the vigor and effect with which the judgments of the courts were enforced, would naturally render false accusations, vexatious suits, and fraudulent perversions of justice not only more frequent but also far more serious than they had formerly been. The criminal law was harsh in its treatment of suspected felons, and was not so solicitous as it is now that the accused should be given every chance to prove his innocence. Hence a perversion of the new process of indictment would furnish a ready means of paying off an old grudge. The multiplication of cases of this kind would soon attract the attention of the judges and would make them desirous of finding some method whereby this employment of the machinery of the law as an engine of oppression might be stopped. Now such enterprises almost always require the coöperation of a plurality of performers. Hence, the judges would soon observe that the false prosecution might be in some degree hindered by an interference with the original combination. In this way the conspiracy would in time come to be considered as at least an element in the offense, and punished as such.

travelling hazardous. The civil authorities, consequently, had to put forth their utmost exertions to punish the actual perpetration of such outrages. Under these conditions the idea of punishing mere agreements to commit crimes would scarcely arise. Such a thing would not be attempted until the supremacy of the law had become so firmly established that the punishment of actual wrong-doing was regular and certain and opportunity was left for positive attempts at prevention. Not until the crime had been committed would the law be invoked; and then the malefactor would be subjected to the penalty prescribed for his misdeed, with little attention to any conspiracy or other thing preceding, except possibly in so far as it might constitute matter of aggravation. As for combinations to defraud, we must recollect that at the time of Henry III there was no legal remedy for cheating and deception.¹¹ In the early stages of the law it is not to be supposed that the confederacy to perform an act not itself judicially cognizable would be considered a crime. Hence we have every reason to believe that a conspiracy in pre-Edwardian times included no more than what is mentioned by Britton and exemplified in the Year Books—combinations to defeat justice.

There is no reference in the books which antedate the first Ordinance of Conspirators to any but the criminal aspect of conspiracy. Whether the law provided a civil remedy for the offense cannot be known with certainty. It seems clear that the royal courts had developed no such remedy before the statutes. Neither Glanville, Bracton, Britton, nor Fleta refers to it, though they all treat exclusively and exhaustively of the law administered in those tribunals. Moreover, the writ which is provided by the Ordinance concludes with the phrase "*contra formam statuti*." It is quite possible, however, that civil actions were entertained in the county, hundred, and feudal courts for the redress of wrongs originating in unlawful combinations; if not generally, yet under certain conditions or in certain localities. But no positive proof upon this point

¹¹ Pollock & Maitland, "*History of English Law*," Vol. 2, p. 538.

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can be adduced. Since none of these local tribunals were "courts of record," we have very little information in regard to the various customs recognized and enforced by them. Indeed, the older law so confused civil and criminal procedure that in speaking of a "civil" action of conspiracy at the period under discussion we may be guilty of an anachronism.

Modern law treats as a crime the mere combination to do certain acts. The offense is complete as soon as the agreement is formed, and is wholly distinct from any act performed in pursuance of it. The ancient law was otherwise. The conspiracy was an element to be taken into account, but was not in itself a complete crime. For this statement we have the authority of Bracton.¹² Writing of principal and accessory in criminal prosecutions, he states that the accessory may not be put to answer until the principal has been tried; "because," he adds, "where there is a principal party, there may sometimes be an accessory, but never an accessory where there is no principal party, because where a principal act has no existence, things consequent on it can have no place, as may be said of precept, conspiracy, and such like, because these things may occur even without any act, and are sometimes punished if an act is subsequent, but without any act not so, like the saying: 'For what harm did the attempt cause, since the injury took no effect?' Nor ought precept, conspiracy, precept and counsel to do harm, unless some act follows." Traces of this principle linger long after the reign of Edward I. In 1368 (42 Edw. III)¹³ we find a case arising upon a writ of conspiracy in which the argument is made by counsel and assented to by the court that a mere "parlaunce" of conspiracy without an act in execution of it is not an indictable offense. The preamble to the statute 3 Henry VII, C. 14 (1486), declaring conspiracies to destroy the king or his great officers to be felonies recites that such conspiracies are frequent, and that "by the law of this land if actual deeds

¹² *Op. cit.*, Vol. 2, pp. 335-7.

¹³ *Year Book*, 42 Edw. III, fol. 14.

be not had, there is no remedy for such false compassings, imaginations, and confederacies against any Lord, etc. . . . and so great inconveniences might ensue if such ungodly demeanings should not be straitly punished before that actual deed be done." At the time of this statute, and even of the case cited, the tendency to hold the combination punishable apart from the act performed by it was becoming noticeable. The citations given, however, sufficiently evidence the older rule that the bare conspiracy was not subject to the animadversion of the courts.¹⁴

The above pages present a complete inventory of such information regarding the ancient common-law conception of conspiracy as can be gleaned from the scanty evidence that has come down to us. We must now take up and explain the contents and effect of the Edwardian statutes of conspiracy.

The first of these, passed in 1293 (21 Edw. I),¹⁵ is usually spoken of as the Ordinance of Conspirators. Its provisions are as follows: "As to those who may desire to complain of conspirators, procurers of pleas maliciously to be moved in the country, as well as of brokers who maliciously maintain and sustain such pleas and contumelies that they may thence have part of the land or any other benefit, let them come before the justices assigned to the pleas of our Lord the King and there let them find security for prosecuting

¹⁴ That even the criminal law punished conspiracy only after the performance of an overt act is rendered probable by the fact that until about the time of Charles II the large majority of the conspiracy cases in the books are civil actions for damages. In the nature of things, for the purposes of a civil suit the importance of the act done must be greater than the mere combination to do it. The influence of this principle is seen in the rule that a writ of conspiracy would not lie unless the plaintiff had been actually accused of a felony before a competent tribunal and legally acquitted by the verdict of a jury. As the criminal law of conspiracy closely followed the principles worked out in the civil courts touching other aspects of the offense, the influence of this great principle also must have affected the attitude of the criminal courts toward the same matter. It is profoundly significant that when the criminal law governing unlawful combinations began to widen, new cases were brought in under the name of "confederacy." For many years "conspiracy" had the technical meaning assigned to it by the civil courts in connection with cases arising upon writs of conspiracy.

¹⁵ 1 Rot. Parl., p. 96.

their plaint. And let the Sheriff be commanded by the writ of the Chief Justice and under his seal that they [i. e., the defendants] be before the King at a certain day; and there let swift justice be done. And let those who shall be convicted of this be severely punished according to the discretion of the justices aforesaid, by imprisonment and ransom; or let such plaintiffs, if they so desire, await the iter of the justices in their neighborhood, and there let them pursue their remedy."

This ordinance appears among the statutes of uncertain date in a slightly altered form:¹⁶ "Our Lord the King at the information of Gilbert de Roubery, clerk of his council, hath commanded that whoever will complain of conspirators, inventors, and maintainers of false quarrels, and their abettors and supporters and having part therein, and brokers of debates, that persons so grieved and complaining shall come to the chief justices of our Lord the King, and shall have a writ of them, under their seals, to attach such offenders to answer to the parties grieved so complaining before the aforesaid justices; and such shall be the writ made for them: [Here follows the writ; see p. 26, n. 3.] And if any be thereof convicted at the suit of such complain-

¹⁶ Bigelow, in his "Cases on the Law of Tort" (p. 211), speaks of this act as having been passed "about the same time" as the *Articuli super Chartas*. Italicizing the phrase in the writ given by the former act, "*secundum ordinationem nostram nuper inde provisam*," he continues: "From this it appears that this statute (which is classed among those of uncertain date) was subsequent to that of the 21 Edw. I, and that the first act above mentioned was designed to afford an ample private remedy to the person aggrieved, as well as a public prosecution."

The better opinion seems to be, however, that this ordinance is not a new enactment, but an inexact transcript or reproduction of the 21 Edw. I, with the addition of a specific writ subsequently devised. None of the other authorities mention any ordinance passed between 21 and 28 Edw. I. The instrument under discussion states only that the king "hath commanded," etc.; it does not direct anything to be done, beyond saying that "such shall be the writ made for them." The contents of the instrument are practically identical with those of 21 Edw. I, except for the writ. So one is forced to conclude that this instrument is nothing but a recital of the Act of 21 Edw. I, accompanied by a definite writ to be used in the premises.

On the dates of these ordinances, see notes in 1 Statutes at Large (Tomlins), pp. 256, 292, 399.

ants, he shall be imprisoned till he hath made satisfaction to the party grieved, and he shall also pay a grievous fine to the King." An incorrect and incomplete version of the same ordinance is also appended to the Statute of Champerty,¹⁷ and wrongly attributed to the thirty-third year of Edward I.

Whether the last two of these instruments are but inexact transcripts of the first, or whether they reenacted it with the addition of a specific writ, the purpose of the group was to provide a civil action in the royal courts for damages caused by the acts of unlawful combinations of malefactors. No especial significance is to be attached to the provisions for fine and imprisonment to be inflicted upon those found guilty of conspiracy in these proceedings. Such penalties were commonly inflicted upon unsuccessful parties to a civil action, and they only bear testimony to the indistinctness of the line drawn between civil and criminal procedure in early English law.

The next statute that deals with conspiracy is the *Articuli Super Chartas*, 1300 (28 Edw. I, Stat. 3, C. 10).¹⁸ It provides as follows: "In regard to conspirators, false informers, and evil procurers of dozens, assizes, inquests, and juries, the King hath ordained remedy for the plaintiffs by a writ out of the chancery. And notwithstanding, he willeth that his justices of the one bench and of the other, and justices assigned to take assizes, when they come into the country to do their office, shall upon every plaint made unto them, award inquests thereupon without writ, and shall do right unto the plaintiffs without delay." This act is evidently intended to improve the remedy previously established by permitting actions of conspiracy to be begun without writs. What its effect was cannot be known with certainty. One or two allusions in the earlier Year Books would indicate some doubt in the minds of the judges whether the action by writ of conspiracy was intended to be entirely superseded by the new remedy. This doubt,

¹⁷ 33 Edw. III, C. 3 (1305); 1 Statutes at Large, p. 150.

¹⁸ 1 Statutes at Large (Tomlins), p. 283.

however, seems to have been resolved in favor of the older action. All the cases in the Year Books (except a few criminal prosecutions) were begun by writs; and there is nothing to show that the new procedure was ever followed at all.¹⁹

We come now to the statute which for the first time tells us something regarding the exact nature of the offense of conspiracy. This is the famous Definition of Conspirators, made in 1304 (33 Edw. I, Stat. 2),²⁰ which served as the very basis of the law for a long time after its passage. It states "who be conspirators" in these words: "Conspirators be they that do confeder or bind themselves by oath, covenant or other alliance that every of them shall aid and support the enterprise of each other falsely and maliciously

¹⁹ Of this statute Fitzherbert says: "There is also another writ of conspiracy which is given upon the statute called *Articuli super Chartas*, 28 Edw. I, cap. 10, which writ shall be directed unto the justices of assize to enquire of the conspiracy; and the writ shall be such:

"The king to his beloved and faithful W. of S. and his companions, etc., assigned, greeting: Whereas among other articles which Lord Edward, formerly king of England, our grandfather, granted for the amendment of the estate of his people, it is ordained, that of conspirators, false informers [etc., following the substance of the statute], as in the articles aforesaid is more fully contained: We, willing that the said articles in all things to be inviolably observed, command you that having looked into the ordinance aforesaid, you further willingly do, at the prosecution of all and singular persons complaining before you, that, which according to the form of the ordinance aforesaid shall be fit to be done. Witness, etc.

"And upon that he shall have an alias and pluries, and attachment against the mayor or sheriff, etc., if they do not according to the writ sent unto them, or return the cause why they cannot do the same; and it seemeth reasonable that the party in prison should have an action upon that statute against the recognizor, if he find him not bread and water in prison, etc., according to the statute." *De Natura Brevium* (9th edition, 1762), f. 116.

No case is cited referring to the statute, and there is nothing in the books to show the manner in which it operated in practice. Its importance, if it ever had any, was doubtless destroyed by the decadence of the civil action of conspiracy. After this had been displaced by the action on the case, suits for damages caused by false accusations, etc., were brought in the more flexible proceeding, while prosecutions for conspiracy were begun by indictment or information. Thus the older procedure, which partook of the nature both of a civil and of a criminal remedy, was left no sphere in which it could operate.

²⁰ 1 St. at L., p. 292 (Tomlins Ed.); 1 St. at L. (Ruffhead Ed.), pp. 149-50.

to indite, or cause to be indited, or falsely to acquit people, or falsely to move or maintain pleas; and also such as cause children within age to appeal men of felony, whereby they are imprisoned and sore grieved; and such as retain men in the country with liveries or fees for to maintain their malicious enterprises and to suppress the truth; and this extendeth as well to the takers as to the givers. And stewards and bailiffs of great lords, which by their seignory, office or power undertake to bear or maintain quarrels, pleas or debates for other matters than such as touch the estate of their lords or themselves. This ordinance and final definition of conspirators was made and accorded by the king and his council in his Parliament the thirty-third year of his reign. And it was further ordained, that justices assigned to the hearing and determination of felonies and trespasses should have the transcript hereof."

There are a few other early statutes relating to conspiracy. These, however, are of but little importance for our present purpose.²¹

²¹ On November 27, 1330 (Stat. 4 Edw. III, C. 11; 1 St. at L., Ruffhead, p. 204), a statute was passed which extended the criminal remedy for conspiracy. This act will be discussed presently. Fourteen years later (1344, 18 Edw. III, Stat. 1), it was declared that exigents should be awarded against "conspirators, confederators and maintainers of false quarrels." In the seventh year of Henry V (St. 7 Hen. V; 1 St. at L., 510) the civil remedy was improved by an act directing that, on account of the frequency of prosecutions by conspirators for felonies alleged to have been committed "in a place where there is none such," justices shall notice ex officio whether there is any such place as that named in the appeal or indictment; and if not, the process shall be void, the accused shall have writs of conspiracy against their "indictors, procurers and conspirators," and these shall be also punished by imprisonment, fine and ransom for the benefit of the king. "This act was continued by 9 Hen. V, St. 1, C. 1 (1421), and made perpetual by St. 18 Hen. VI, C. 12 (1439).

By St. 6 Hen. VI, C. 1 (1427), reciting that many people are falsely indicted by conspirators, the time within which a *capias* is returnable and an exigent awarded is extended, and the *capias* is issued to the sheriff of the county in which the crime was alleged to be committed, as well as to the sheriff of the county in which the accused resides.

Finally, by Stat. 8 Hen. VI, C. 10 (1429), which recites that many persons are falsely accused of felony in a county or franchise other than that in which they reside, and are outlawed, further safeguards in the way of notice and delay before exigents shall issue are pro-

The real purpose and effect of the Edwardian statutes may be briefly summarized as follows: Although the civil action of conspiracy in the royal courts provided by the Ordinance of 21 Edward I and the *Articuli super Chartas* was probably an innovation, the Definition of Conspirators was in the nature of a codification of existing law. The conception of conspiracy which appears in the Definition, and in the later statutes which slightly extend and improve it, is but little in advance of that attained by Bracton and Britton. So we may be permitted to believe that these ordinances were intended to set out the entire law of conspiracy as it was then understood.²² In other words, the

vided, and persons acquitted upon such prosecutions are given an action upon the case against the procurers of such indictments and are allowed to recover treble damages.

²² The contrary view is taken by Buchanan, J., in the great American case upon conspiracy, *State vs. Buchanan et al.*, 5 H. & J. (Md.) 317, decided in 1821. Speaking of the Definition of Conspirators, 33 Edw. I, he says (p. 335): "It is equally clear, that the statute does not embrace all the ground covered by the common law. Who doubts, or was it ever questioned, that a conspiracy to commit any felony is an indictable offense; as to rob or murder, to commit a rape, burglary or arson, etc., or a misdemeanor, as to cheat by false public tokens, etc.? . . . Yet such cases of conspiracy are not made punishable by any statute, and are only indictable at common law; which could not be if the statute 33 Edw. I either furnished a definition of all the conspiracies indictable at common law, or restricted and abridged the latter, by rendering punishable, all such as it does not define. . . . The statute, therefore, must be considered either as declaratory of the common law only, so far as it goes, for the purpose of removing doubts and difficulties which may have existed in relation to the conspiracies it enumerates, by giving them a particular and definite description: or as superadding them to other classes of conspiracy already known to the common law, leaving the common law in possession of all the ground it occupied beyond the provisions of the statute. And so it has been uniformly understood in England, from the earliest down to the latest decision that is to be found on the subject; otherwise the Judges could not have sustained a great proportion of the prosecutions for conspiracy, with which the books are crowded; in some of which the objection, that the matter charged was not within the statute 33 Edw. I, was made and overruled, as will be hereafter shown."

It will be noted that the phrase "common law" may be understood in two senses. It may refer to the customary law existing before the Definition of Conspirators, or it may mean the entire body of principles developed and applied by the courts at any one period. Now Judge Buchanan is right in saying that conspiracy is largely of common-law origin, understanding the term in the second of these senses. But this does not commit us to

essential purpose of the Edwardian statutes was to render clear and certain the already existing principles of the common law relating to unlawful combinations, and to create and improve the judicial machinery through which that law was to be administered.²³

It is difficult to say just what was the ultimate effect of

the position that the Definition of 33 Edw. I covered only a part of what was known to be law in regard to conspiracy at that time. The unsoundness of this opinion appears almost beyond question when we examine what evidence has been preserved to us. As the cases increased, and other conspiracies than those to enter false accusations were brought before the courts, the judges extended the law to embrace them. But this was clearly a process of judicial legislation, as appears from the manner in which this extension took place. (See Ch. III.) Thus there was developed a supplementary body of unwritten law which soon outstripped the statutes and furnished ample authority to support Judge Buchanan's decision in the case under discussion. It did not make any real difference, therefore, in this case whether the Edwardian statutes did or did not embody all the then law relating to conspiracy. Indeed, all that Judge Buchanan needed to hold, in any event, was that the Definition did not render "dispunishable" all combinations except those which it mentions.

²³ Wright, in his monograph entitled "The Law of Criminal Conspiracies and Agreements," says (p. 5): "There appears to be no evidence that, during the first of these periods [1200-1600], any other crime of conspiracy or combination was known to the common law than that which was authoritatively and 'finally' defined in A. D. 1305 by the Ordinance of Conspirators, 33 Ed. I, as consisting in confederacy or alliance for the false and malicious promotion of indictments and pleas, or for embracery or maintenance of various kinds." This statement is substantially true, though a tendency to broaden the offense appears during this period.

Mr. Justice Wright, however, is in error in his opinion that "even the civil writ of conspiracy appears not to have been extended until the seventeenth century to any matters beyond the purview of the 33 Edw. I" (*ibid.*, p. 12). On the contrary, as is shown in Chapter II of the present study, as early as the reign of Edward III the civil action was entertained for several matters not within the statute; whereas by the seventeenth century it had been practically displaced by the new action on the case in the nature of a conspiracy.

He also gives several reasons which he considers to be "nearly conclusive that the crime of conspiracy was created by statute, and that no such crime was known to the common law." Without taking these up in detail, we may state that they do not, in our opinion, sustain his contention. A careful examination of all the evidence at our disposal seems amply to justify the conclusion stated in the text: that the Edwardian statutes merely gave definite and authoritative expression to a conception which had already arisen in the common law, and which retained its essential features for many years after the passage of these enactments.

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these statutes upon the development of the conception of conspiracy. They were doubtless both a help and a hindrance. At the time of their passage the law of conspiracy was in a formative stage. The conception of the offense had not as yet been logically and completely worked out by the legal thought of the age. Hence, statutory expression may have been prematurely given to it, and so have clothed it with a finality and a rigidity which prevented its gradual improvement by the slow and silent processes of the common law.²⁴ This consideration may account for the slow progress made by the law of conspiracy during the next two hundred years, until new impetus was given to it by the decisions of the Court of Star Chamber. Still, it is probable that the total effect of the statutes upon the law was, upon the whole, favorable to its growth. They assigned it a definite place in the national jurisprudence, provided suitable procedure for the trial and punishment of conspirators, and prescribed adequate penalties for the enforcement of the law. Many cases were consequently drawn into the royal courts, whose decisions soon revealed the defects in the old conception of conspiracy and called attention to the possibilities of its future development. In this way the statutes so greatly advanced the progress of the law toward its modern form that they may be justly said to be the most important factor in the early history of conspiracy, though not the original source from which it arose.

²⁴ This statement is not inconsistent with the undeniable truth that the principles governing both the civil and the criminal remedies for conspiracy were largely a product of judicial legislation. The statutes undoubtedly confined the law within too narrow limits, judged according to our present notions; but it required elaboration and extension even within those limits. This is the task to which the courts devoted themselves for some years after the passage of the statutes; whereas, had these not been enacted, the judges might have been widening the general conception of conspiracy, leaving for a future time the settlement of its details.

CHAPTER II.

THE GROWTH AND DECAY OF THE CIVIL ACTION OF CONSPIRACY.

The statutes of Edward authorizing the royal courts to entertain civil actions for the redress of certain injuries inflicted by combinations of persons served as a foundation upon which the courts reared a complex structure of unwritten law relating to conspiracy. Limitations as to space forbid an enumeration of the steps whereby the old "strict" or "formed" action of conspiracy was evolved. The process was about completed by the time of Henry VII (1485). It will be necessary, however, to examine the matured form of the strict action as it appeared at this period, in order that its inherent limitations and defects may be pointed out, and the way opened for an intelligible account of the progress and causes of its decline and practical disappearance.¹

The action by writ of conspiracy could be brought by a person who had been acquitted upon a false indictment preferred by two or more persons acting in concert. It also lay for a false appeal in which the plaintiff had been non-suit. Nothing else than a technical acquittal by verdict would support the action. If the plaintiff had gone free by reason of a defective indictment, a charter of pardon, or benefit of clergy, he had no standing in court. Even if an appeal had been sued while the indictment was pending, and upon this appeal the accused had been acquitted, wherefore the indictment also failed, he was not entitled to his writ of conspiracy, because he had not been technically

¹ The following description of the old strict action of conspiracy is based upon a personal examination of sixty-odd conspiracy cases in the Year Books of the period between the reign of Edward II and that of Henry VIII. I have thought it best, however, not to encumber the text with specific references, except in a few instances, to the individual cases. These can be found in F. N. B., f. 116.

acquitted upon the indictment. In like manner, if a person had been falsely indicted as an accessory to a crime, the acquittal of his principal gave him (the accessory) a right of action against the accusers; not so if the principal had died before the rendition of a verdict or had escaped in any of the ways mentioned above. The writ of conspiracy could not be brought jointly by husband and wife, or by two or more persons acquitted upon a joint indictment, because the grievance was said to be several in all cases.

The writ of conspiracy lay only against two or more defendants. Hence, if all the defendants but one were found guiltless, he was necessarily discharged also. If, however, one of two defendants had been discharged by "matter of law" (i. e., in any other way than by acquittal by verdict), or had died during the pendency of the action, the plaintiff might still proceed to a judgment against the other. Husband and wife, also, were held to constitute but one person in the eye of the law, and they were therefore incapable of conspiring with one another.

Certain classes of persons were immune from actions of conspiracy. The most important of these were the members of the presenting jury, or "indictors," who had found the indictment upon which the accused had been prosecuted. Their protection was absolute, even if they had procured themselves to be placed upon the inquest for the sole purpose of indicting the plaintiff. In one case this protection was allowed, by analogy, to the extendors in an elegit who had conspired to deprive a person of his land by means of a false extension. A qualified immunity could be claimed by witnesses and other informers connected with the unsuccessful prosecution. As long as these had acted under compulsion of the law and in good faith, they were protected from suit; not so if they could be shown to have been guilty of any collateral corruption, malice or covin. Commissioned judges, justices of the peace, bailiffs and other court officers who had assisted in the prosecution of the accused occupied a very similar position. If they had acted in pursuance of their duties and within the scope of

their offices, they were exempt from suit; but if they had gone outside of their duties, they might be held liable. In the same way it appears that a "man of the law" could not be charged with conspiracy by reason of advice rendered a client which led to an indictment or an appeal, provided he had acted in good faith and in the course of his professional duty.

An action of conspiracy lay upon an acquittal by verdict of a charge of felony or of treason. This is the principle finally settled upon by the authorities. We find in the Year Books during the reign of Edward III, however, several cases in which writs of conspiracy were grounded upon injuries not covered by the above principle or even by the Definition of Conspirators.² These exceptional cases may

² The Definition of Conspirators, as we have seen, was confined in its terms almost exclusively to combinations to pervert justice.

In the Year Book for the fortieth year of Edward III (1366) we find a case wherein an action of conspiracy was allowed for a combination to disturb the plaintiffs in the exercise of their right of advowson. The defendants had made a false letter, purporting to be signed by the plaintiffs, requesting the bishop to receive a certain clerk. This clerk was accordingly presented and inducted, and the plaintiffs were thus prevented from appointing their own clerk until they had brought a *quare impedit* and recovered their presentation. The court said that "for such false understandings, deceits, or conspiracies the action of conspiracy lies" (P. 40 Edw. III, f. 19).

Two years later a similar action was entertained for a conspiracy to procure a disseisin and feoffment resulting in a loss of warranty. In the same year an action was brought for a conspiracy to enter an action of novel disseisin in the name of the now plaintiff, wherein the defendant had pleaded that the plaintiff was a villein and the court had decided accordingly—in other words, for a conspiracy to deprive the plaintiff of his liberty and reduce him to villenage. The court held that the writ of conspiracy would lie, for if such falsity were not punished, any freeman might be made a villein in the same violent manner (H. 42 Edw. III, f. 1; P. 42 Edw. III, f. 14).

There is some ground for believing that a writ of conspiracy would lie for combinations to forge false deeds and offer them in evidence, whereby the plaintiff lost his case; also for a conspiracy to cause a false office to be found of the plaintiff's land (T. 39 Edw. III, 13; 46 Edw. III, f. 20; 27 Lib. Ass. 73).

Not only the civil courts, but the criminal courts as well, took cognizance of various combinations of like nature (26 Lib. Ass. 131; 27 Lib. Ass. 74, 73).

None of the above wrongs fell within the field of the matured form of the action of conspiracy, and most of them were beyond the operation of the Definition of Conspirators.

be attributed to the vague form of the writ of conspiracy prescribed in the Ordinance of Conspirators,³ which afforded opportunities for much judicial discretion as to entertaining the action in new cases. In course of time the writ became more explicit in describing the conspiracy complained of. Several definite formulas, applicable to the various circumstances under which false accusations of treason and felony might be prosecuted in vain, came into existence. Finally, these forms became the only legal forms, and unless the complainant's case could be brought within the words of these standard writs, he was obliged to seek another remedy or, failing in this, go without legal redress altogether.

Such were the principles governing the strict action of conspiracy. One can easily foresee the defects soon revealed in practice. This ancient remedy fell short of the necessities of the conditions under which it originated.

³ The following is the form of writ prescribed by the Ordinance of 21 Edw. I: "The King to the Sheriff, Greeting. We command you that if A. de G. shall give you security for prosecuting his plaint, then place under gage and safe pledges G. de C. that he be before us in octabis sancti Joh' Baptistae, wheresoever in England we shall be, to answer the said A. for his plea of conspiracy and transgression, according to our ordinance lately thereupon provided, according as the said A. may reasonably show that he ought to answer to him for it, and have there the names of the pledges and this writ. Teste, etc."

The above language in no way describes the wrong to be redressed, beyond calling it a conspiracy. The plaintiff might accordingly sue out his writ of conspiracy, and then "count" upon almost any kind of injury done him by a combination of persons. The court thus was left an unbounded discretion to determine whether the wrong complained of was a conspiracy under the statutes or according to the general principles of the common law. This consideration probably accounts for the extensions which the action of conspiracy received during the period under discussion.

It may have been this very disposition of the courts freely to extend the remedy whenever reason and justice seemed to demand it that contributed to cause the writ of conspiracy to become more definite in its description of the tort to be redressed. All we can say with assurance, however, is that exceptional cases like the above are no longer met with after the reign of Edward III, and that by the time of the compilation of the Register Brevium, and of the De Natura Brevium (Fitzherbert), the writ of conspiracy had become differentiated into a number of distinct forms, each applicable to a single group of circumstances under which the action of conspiracy would lie.

There were many injuries of the same general character as those just enumerated which the action of conspiracy was incapable of reaching. False indictments might be preferred by a single individual. The offense charged might be a crime other than treason or felony. Other perversions of justice besides false accusations might be wrought, by single persons or by combinations of persons. False accusations might fail in other ways than by the acquittal of the accused. All of these wrongful acts were beyond the purview of the writ of conspiracy, but that they should go unpunished was intolerable. On the other hand, false indictments might be preferred by a combination of persons acting in good faith. If such persons were to be liable in damages whenever the accused happened to escape conviction, manifest injustice would be done. So extended a liability to actions of conspiracy would also deter people from laying charges against evildoers, and would thus operate as a serious hindrance to the administration of criminal justice.⁴

These defects were eliminated by a process of judicial legislation, operating under the cover of a supplementary form of action which grew up beside the action of conspiracy and enabled the courts to take cognizance of wrongs of the same general nature as those redressed by the older remedy, but excluded from its field by some technical barrier.⁵ The result was the complete displacement of the old

⁴This was a particularly serious objection in the England of that period, because the prosecution of criminals depended almost entirely upon the zeal of private individuals. Any undue deterrent upon private initiative in this direction would almost certainly result in a large increase of lawlessness.

⁵We ought not to be surprised at seeing the defects of the action of conspiracy rendered harmless in this roundabout fashion. It would have been utterly repugnant to the traditions of the early law for the courts openly to have changed the principles governing the older remedy. The characteristic method of legal development, in England as elsewhere, has always been to mask a change in the essentials of the law under a nominal adherence to its letter. Hence, in quietly broadening the legal remedy for false and malicious prosecutions through the agency of a supplementary form of action, which apparently left the older remedy untouched while really undermining its very foundation, the English courts were merely giving a special illustration of the manner in which legal fictions, equitable remedies, and the like, come into being.

remedy by the new, which, being based upon an ultimately sound conception, has survived to the present day under the name of "malicious prosecution." The story of this phase of the law of conspiracy is interesting in the extreme, and vividly pictures the mode in which the English common law has grown to be what it is today. We shall accordingly describe the changes in the civil law of conspiracy effected by the new remedy, and then explain the causes which brought them about and finally led to the extinction of the old strict action of conspiracy.

The new remedy was an action upon the case "in the nature of a conspiracy."⁶ It was first⁷ brought into the

⁶The "action upon the case" had its origin in Chapter 24 of the Statute of Westminster 2, passed in the thirteenth year of the reign of Edward I (1285). Before this statute, when a person wished to bring an action for damages for some legal injury done him, he was obliged to show that the facts of his case could be comprehended within one or more of the formal, authoritative "original" writs contained in the Register. If this were impossible, he must appeal to the chancellor or go without remedy altogether, for only Parliament could change or create an original writ. In the growing volume of litigation, however, more and more cases appeared which were not covered by already existing original writs, but which obviously called for redress. Accordingly the above statute provided as follows: "And whenever from henceforth it shall fortune in the Chancery, that in one case a writ is found, and in like case (in consimili casu) falling under like law, and requiring like remedy, is found none, the clerks of the Chancery shall agree in making the writ." Such writs were held to no strict form, but were framed to fit the circumstances of specific cases. Actions begun by means of these special, individual writs were known as "actions upon the case," and were soon extended to numerous wrongs hitherto not legally remediable. The operation and value of this new remedy are strikingly illustrated in the history of the action upon the case "in the nature of a conspiracy."

⁷Lord Holt seems to claim for the action upon the case in the nature of a conspiracy a much earlier beginning than this. Speaking of several earlier cases, among them two or three decided during the reign of Edward III, he says, "These actions of conspiracy in the old books were really but actions upon the case: but conspiracy properly so-called does not lie unless the party were indicted of a capital crime" (Savile vs. Roberts, 12 Mod. 209). This remark holds true of some of the cases that he cites; but it is not applicable to the abnormal cases of conspiracy reported in the reign of Edward III, of which mention has been made. It is improper to speak of these as actions upon the case. The statement implies an anachronism. At that period the strict action of conspiracy was in a formative state. The limits of that remedy

field heretofore occupied solely by the action of conspiracy by the Statute 8 Henry VI, Chapter 10 (1429). This act provided that any person falsely indicted or appealed in a jurisdiction in which he does not reside shall, after acquittal by verdict, "have a writ and action upon his case against every procurer of such indictments or appeals," and shall recover treble damages. This statute was held (Y. B., 11 Hen. VII, f. 25) to have provided a remedy broader than the strict action of conspiracy: whereas the latter lay only after a false indictment for felony, and only against two or more defendants, the former lay for a false indictment for a mere trespass, and against a single defendant. The obvious advantages of the action begun by a writ "framed as the matter required," and "tied down to no strict form," soon caused it to encroach deeply upon the province of the strict action of conspiracy, where indeed it almost immediately displaced the older remedy altogether. There are no cases begun by a strict writ of conspiracy later than the reign of James I (1603-1624). The discussions regarding the nature of the strict action of conspiracy, so often met with from the time of James I until the reign of Anne, were designed to mark out the limits of the ancient remedy, and to show that the new principles being introduced in connection with actions upon the case in the nature of a conspiracy were not inconsistent with the old, because applicable to an entirely different sphere.⁸

were so indistinct and shifting (owing, as we have seen, to the vague and general phraseology of the writ of conspiracy) that redress could readily be extended to exceptional cases without violence to any of the principles relating to the action of conspiracy. Not until these had hardened into the set forms of a later period was it necessary that an action upon the case be employed to redress "*consimiles casus*." At the time of Edward III, the conditions which gave rise to the action upon the case in the nature of a conspiracy had not yet come into existence.

⁸ Thus, in *Smith vs. Cranshaw*, 1 Jones 93 (1 Car. I, 1625), the court says: "There are two writs of conspiracy: the one the writ of conspiracy in the Register and the other is an action on the case, and if a man brings writ of conspiracy mentioned in the Register, he should be indicted and acquitted, and if he is not acquitted no action lies. There must be a conspiracy, hence writ of conspiracy does not lie against one, for one cannot conspire

The improvements effected in the law by means of the new action upon the case were gradually wrought out in a line of judicial decisions extending from the reign of Henry VII to that of George I (1485-1726). The practical completion of the process was shown in the great cases of *Savile vs. Roberts* (10 Wm. III, 1698) and *Jones vs. Gwynn* (12 Anne, 1713), to be discussed presently. Its results may be briefly stated in the form of the new principles established by it.

1. A single person who preferred a false and malicious indictment was subjected to a liability to the party injured similar to that previously enforced in an action of conspiracy against a combination of persons who had been guilty of the same act. In the words of Lord Holt,⁹ "Wherever an action of conspiracy is maintainable against two, there if it be a malicious prosecution by one, case will lie."¹⁰

alone, for the writ of conspiracy having a precise form cannot be extended beyond the form." But the action upon the case, the court continues, is framed as the matter requires, and is not confined to any strict form. Hence it lies against one person, and upon a mere *ignoramus*. The purpose of this contrast is clearly to enable the court to establish the broader principles applicable to the action upon the case without contravening the current doctrines regarding the action of conspiracy. There are similar comparisons between the two forms of action, and for a like purpose, in *Savile vs. Roberts* (12 Mod. 209), and *Jones vs. Gwynn* (10 Mod. 148, 214).

⁹ *Savile vs. Roberts*, 12 Mod. 208.

¹⁰ The availability of the action upon the case against a single defendant was the feature which first attracted notice. At first there was a tendency for the courts to hold that actions upon the case would lie against one defendant only when the crime charged had been a trespass. For malicious indictments for felony, it was thought, the action of conspiracy would furnish the only redress. Thus, in *Shotboldt's Case*, Godb. 76 (28-29 Eliz., 1586-7), Clench, J., said that "such a conspiracy which is grounded upon an indictment of felony must be against two at the least, for the same is an action grounded upon the common law." This distinction, however, soon disappeared. The case of *Knight vs. German*, Cro. El. 70, 134, decided during the same reign (29 and 31 Eliz., 1587 and 1589), was grounded upon a false indictment for felony, and a single defendant was made to plead probable cause. Lord Coke said, "The words here, and in a conspiracy, are all one; and as a writ of conspiracy lieth against two, so here [case lieth] against one." This is the doctrine of the later cases. The books record an increasing number of actions upon the case against single

2. Actions upon the case were entertained in favor of persons injured by false and malicious accusations of offenses amounting only to trespasses.¹¹ Recovery was in like manner allowed for the damages inflicted by false and malicious proceedings in the civil¹² and in the ecclesiastical¹³

defendants wherein the wrongs complained of would have supported actions of conspiracy had they been perpetrated by a combination of persons. The true principle was broadly stated in *Savile vs. Roberts*, and it held its place until the decay of the action of conspiracy took away from it all practical importance.

¹¹ Here again the courts at first showed a disposition to narrow the operation of the new principle. It was intimated in *Law vs. Beardmore*, T. Raym. 135 (17 Car. II, 1665), that an indictment for a bare trespass is not actionable; "but where the matter of the indictment is scandal, or cause of corporal punishment, there [an action] lyeth." Three cases decided in the twenty-first year of Charles II (1669)—*Skinner vs. Gunton*, 2 Keb. 473, wherein the plaintiff had been arrested and imprisoned in a false civil action of debt; *Price vs. Crofts et al.*, T. Raym. 180, arising out of a false indictment for barratry; and *Henly vs. Burstall*, 1 Vent. 23, 25 (21 Car. II, 1669), in which the cause of action was an indictment against a justice of the peace for rescuing a vagabond out of the hands of the constable who had brought the latter before him—all these were within the limitation of *Law vs. Beardmore*. This limitation, however, was soon exceeded. In *Norris vs. Palmer*, 2 Mod. 51 (confirmed in *Anon.*, 2 Mod. 306, 20 Car. II, 1668), the plaintiff was allowed to recover in an action for a malicious indictment for a common trespass involving no scandal—the asportation of 100 bricks.

The point was fully discussed in *Savile vs. Roberts*, 12 Mod. 208. The plaintiff had been maliciously and falsely indicted for a riot. Lord Holt expressly overruled the doctrine that an action would not lie for a false indictment for a trespass unless the charge involved scandal, and gave judgment for the plaintiff. This decision was fully examined and confirmed in *Jones vs. Gwynn*, 10 Mod. 214 (12 Anne, 1713), wherein an action had been brought upon a false and malicious prosecution for exercising without a license the trade of a "corn-badger." Premising that the ground of the action was the expense to which the plaintiff had been put to defend himself from the false charge, the court said that the damage was as great whether the charge was scandalous or not, and the malice also as great or greater. "If scandal be mentioned, it is only mentioned in the nature of damages." This is the modern doctrine.

¹² The early practice of permitting the defendant in an action of debt to be arrested at the beginning of the suit and held in prison unless he was able to give bail to appear in court and satisfy any judgment that might be rendered against him opened manifest opportunities for false and malicious proceedings for which the allowance of costs was not an adequate redress. Accordingly, during the reign of Charles II, actions upon the case for the damages caused by such malicious civil suits came to be allowed. The first of them reported is *Skinner vs. Gunton*,

courts. It became finally settled, also, that an action upon the case would lie for false and malicious accusations of treason,¹⁴ in regard to which the courts for a time had exhibited some uncertainty.

T. Raym. 176, 2 Keb. 473 (21 Car. II, 1669). A typical case is *Daw vs. Swaine*, 1 Sid. 424, decided the same year. Swaine had falsely and maliciously affirmed to the sheriff of Middlesex that Daw owed him £1000, and caused bail to be fixed accordingly, whereas the debt really amounted to only £40. Daw had been unable to secure such large bail, and had consequently been kept in gaol for several days. He was allowed to recover a judgment against Swaine in an action upon the case; "because," the court said, "he had special damages from such false parlaunce." See also *Hocking vs. Mathew et al.*, 1 Sid. 463 (22 Car. II, 1670), *Webster vs. Haigh*, 3 Lev. 210 (36-37 Car. II, 1684), and *Bird vs. Line*, Comyn 190 (8 Anne, 1709). During the reigns of William III and Anne it was thought that such an action would lie only in case the plaintiff could show that he had been held to excessive or "special" bail. See *Neal vs. Spencer*, 12 Mod. 257 (10 W. III, 1698); *Robins vs. Robins*, 12 Mod. 273 (11 W. III, 1699); *Parker vs. Langley*, 10 Mod. 145, 210 (11-12 Anne, 1712-13). In *Goslin vs. Wilcock*, 2 Wils. 302 (6 Geo. III, 1765), however, the plaintiff was allowed to recover in an action for a false arrest in a malicious civil suit, without any allegation that he had been held to excessive bail. This decision was perfectly proper. Excessive bail is only an evidence of malice or of damages; and if these can be proved by other facts, the necessities of the action are satisfied.

¹⁴ This doctrine dates from the case of *Carlion vs. Mill*, Cro. Car. 291 (8 Car. I, 1632), where it was held that an action upon the case would lie against the apparitor of a bishop for maliciously causing a man to be cited to the consistory court upon a groundless suspicion of incontinence. The reasons for allowing such actions were the same as those given in support of actions for false and malicious civil suits; the malice of the defendant, and the costs which the plaintiff had incurred in repelling the charge. See *Hocking vs. Mathew et al.*, 1 Sid. 463 (22 Car. II, 1670); *Grey vs. Degge*, T. Jones 132 (31-32 Car. II, 1679-80).

An action would lie for a false charge of an ecclesiastical offense only in case the court before which it had been preferred had had jurisdiction over the offense. Thus, in *Bomber vs. Painter*, 2 Bulst. 343 (8 Car. I, 1632), an action for an attempt to charge the plaintiff at quarter sessions with being the father of a bastard child was disallowed, because scandals of this kind were properly cognizable in the spiritual, not in the secular, courts.

¹⁵ In *Lovet vs. Falconer*, 2 Bulst. 220 (11 Jac. I, 1613), an action upon the case had been brought for a false and malicious accusation of treason. The court inclined against entertaining it. "Every one," they said, "by his oath of allegiance is bound to discover treason, and to have one punished for this by an action upon the case in the nature of a writ of conspiracy to be brought against him should be very hard." The case, however, went off upon the point that the false accusation had been preferred before a court without jurisdiction to try it. The question was settled in the great case of *Smith vs. Cranshaw*, 2 Bulst. 270, 1 Jones 93, and other

3. The former technical principle requiring the plaintiff in an action of conspiracy to prove a legal acquittal by verdict of the false charge was greatly relaxed. It became gradually settled that an action upon the case would lie where the grand jury had refused to find an indictment, but had returned an *ignoramus* upon the bill preferred.¹⁵

reports (20 Jac. I.—1 Car. I, 1622–1625), wherein the court held, after listening to several rearguments, that an action would lie for a false and malicious charge of speaking treasonable words, and that as to this there was no diversity between a conspiracy to indict for treason and a conspiracy to indict for a felony.

¹⁵ The first suggestion of this principle is to be found in the case of *Sydenham vs. Keilway*, decided anno 16 Eliz. (1574), and cited in a case reported anno 1 Jac. I (1603), *Cro. Jac. 7*. The court said that although an action of conspiracy would not lie upon an *ignoramus* found, an indictment for the conspiracy would lie at the common law. This distinction was adhered to when actions upon the case came into general use. Thus, in *Barnes vs. Constantine*, *Yelv. 46* (2 Jac. I, 1604), there is an obiter dictum that "this action is but for damages for a slander, which well lies . . . if a bill is offered and an *ignoramus* found." This statement was confirmed in the *Poulterers' Case*, 9 Co. 56 b, six years later. The court said, "And it is true that a writ of conspiracy lies not unless the party is indicted and legitimodo acquietatus, for so are the words of the writ." But they upheld an action upon the case for a false accusation of robbery whereon the grand jury had found *ignoramus*. Some doubt was thrown upon this doctrine in *Lovet vs. Falconer*, 2 Bulst. 270 (11 Jac. I, 1613), and was exhibited by the court during the first argument of *Smith vs. Cranshaw*, *Palm. 315* (1 Car. I, 1625). The final decision of the latter case, however, so firmly established the doctrine that it was never afterwards shaken. See *Payn vs. Porter*, *Cro. Jac. 490* (16 Jac. I, 1618); *Pollard vs. Evans*, 2 Show. 50 (31 Car. II, 1679). In *Godard vs. Smith*, 6 Mod. 261 (3 Anne, 1704), the court seemed clearly opposed to extending it to a case wherein the plaintiff could show only a *nolle prosequi*; but no decision was rendered.

In *Savile vs. Roberts*, 12 Mod. 208, 211 (10 W. III, 1698), Lord Holt was inclined to think that an action could not be maintained upon an *ignoramus* unless the charge involved scandal. This qualification, however, was not adhered to in *Jones vs. Gwynn*, 10 Mod. 214 (12 Anne, 1713), which contains a final statement of the law upon this point. The principle under discussion was unequivocally laid down as authoritative, upon the reason suggested in the *Poulterers' Case* and more fully explained in *Smith vs. Cranshaw*. "Conspiracy," concludes Parker, C. J., "lies not without acquittal, and the reason of this, and the only one, is because this is a formed action, and the form of the writ in the Register is so. . . . There is certainly no argument from an action which is a formed one, for which there is a formed writ in the Register, to an action upon the case, that is tied down to no form at all. If an action upon the case be brought upon an indictment, where the jury find *ignoramus*, there is no possibility that there can be an acquittal."

By a parity of reasoning, actions came to be entertained where the plaintiff had escaped prosecution by reason of a technical defect in the indictment found.¹⁶ Later, also, suits were allowed even for damages inflicted by false and malicious proceedings, civil and criminal, before a tribunal which was without jurisdiction in the premises.¹⁷

¹⁶ The first statement that an action would lie for a malicious prosecution upon a defective indictment is found in an obiter dictum in *Barnes vs. Constantine*, Yelv. 46 (2 Jac. I, 1604). It was repeated as part of the ratio decidendi in *Smithson vs. Symson et al.*, 3 Keb. 141 (25 Car. II, 1673), and confirmed in a note to *Pedro vs. Barrett*, 1 Ld. Raym. 81 (8 W. III, 1696). Lord Holt, in *Savile vs. Roberts*, remarked obiter that such an action grounded upon an erroneous indictment would lie for the slander and injury to the plaintiff's good name; sed aliter when the indictment "contains crime without slander," as in forcible entry. The doubt suggested in *Goddard vs. Smith*, 6 Mod. 261 (3 Anne, 1704), seems applicable to the formed action of conspiracy.

The law upon this matter was finally settled, however, in *Jones vs. Gwynn*, 10 Mod. 214 (12 Anne, 1713). The plaintiff had been indicted for exercising without a license the trade of a "corn-badger." The prosecution failed because this was not an indictable offense. The court held that an action of conspiracy could not be sustained upon these facts, but that an action upon the case might, since the gist of such an action is malice and damages. "It is to be considered," says Parker, C. J. (p. 217), "that the grounds of this action are, on the plaintiff's side, innocence, and on the defendant's side malice. . . . And as the plaintiff is equally damnified by an insufficient as sufficient indictment, so the malice of the defendant is not at all less because the matter was not indictable; nay it is rather an aggravation." Nor is there any reason, he continues, for making a difference when the matter of the indictment is scandalous and when not. Judgment was accordingly given for the plaintiff. This decision has been followed in the later cases. As was said in *Chambers vs. Robinson*, 1 Stra. 691 (12 Geo. I, 1726), "a bad indictment [serves] all the purposes of malice, by putting the party to expense, and exposing him, but it serves to no purpose of justice in bringing the party to punishment if he be guilty." See also *Wicks vs. Fenton et al.*, 4 T. R. 247 (21 Geo. III, 1780).

¹⁷ An action of conspiracy would not lie unless the alleged false and malicious prosecution had been before a court of competent jurisdiction. This principle was at first held applicable to actions upon the case, and the declaration was required to disclose upon its face the competence of the tribunal in which the charge had been tried. See *Throgmorton's Case*, Cro. El. 563 (39 Eliz., 1597); *Arundell vs. Tregon*, Yelv. 116 (5 Jac. I, 1607); *Lovet vs. Falconer*, 2 Bulst 270 (11 Jac. I, 1613); *Anon.*, Styles 374 (1653). In time, however, the strictness of the rule began to relax. In *Taylor and Towlin's Case*, Godb. 444, decided anno 4 Car. I (1628), a bill of conspiracy for a false indictment for rape was entertained by the Court of Star Chamber, although the jurisdiction of the

4. Although the framers of the statutes of conspiracy had sought to provide remedies for false and malicious accusations only, the courts of the time of Edward III, in their zeal to break up conspiracies, were inclined to punish

court in which the charge had been prosecuted was not distinctly alleged. The court at first was inclined to think this a good exception. "But afterwards," we are told, "upon view of the Bill, because the conspiracy was the principal thing tryable and examinable in this court, and that was well laid in the bill, the bill was retayned, and the court proceeded to sentence."

Actions for malicious prosecutions *coram non iudice* were not long in finding their way into the common-law courts. In 1653 the case of *Atwood vs. Monger*, *Styles* 378, arose out of a false presentment before the conservators of the River Thames for suffering eight loads of dirt to fall into the river. After verdict for the plaintiff, the defendant moved in arrest of judgment upon the ground that the record did not disclose the authority of the conservators to receive presentments. The court said, however, that an action lies "for bringing an appeal against one in the common pleas, though it be *coram non iudice*, by reason of the vexation of the party and so it is all one whether here were any jurisdiction or no, for the plaintiff is prejudiced by the vexation, and the conservators took upon them authority to take the presentment."

The principle that an action might lie for a false and malicious civil suit before a court without jurisdiction was stated obiter in *Temple vs. Killingworth*, 12 Mod. 4 (3 W. and M., 1691), and in *Jones vs. Gwynn*, 10 Mod. 214, 219, 220 (12 Anne, 1713). It becomes part of the ratio decidendi in *Goslin vs. Wilcock*, 2 Wils. 302 (6 Geo. III, 1765). Wilcock had caused the arrest of Goslin upon a false and malicious civil action in the court for the Borough of Bridgewater. It was shown that the court at Taunton had jurisdiction of the case, but that Wilcock had caused Goslin to be arrested at Bridgewater because he (Goslin) had a stall in the fair at that place. After verdict for Goslin in an action upon the case grounded upon the above facts, Wilcock moved for a new trial; but the court said: "If you hold a man to bail in an inferior court when you know it hath not jurisdiction, and with malice, an action will lie; that though it was somewhat doubtful but that the declaration should have alleged that the defendant knew he had no cause of action in the jurisdiction of Bridgewater . . . yet justice and equity being on the side of the plaintiff, a new trial would be refused."

It has always been necessary, however, for the plaintiff in an action for a malicious prosecution to show that the prosecution is at an end; "otherwise, he might recover in the action, and yet be afterwards convicted on the original prosecution." *Fisher vs. Bristow*, 1 Dougl. 215 (19 Geo. III, 1778). See also *Glaseour vs. Hurlestone*, *Gouldsb.* 51 (29 Eliz., 1587); *Shotboldt's Case*, *Godb.* 76 (28-9 Eliz., 1587); *Throgmorton's Case*, *Cro. Eliz.*, 563 (39 Eliz., 1597); *Arundell vs. Tregono*, *Yelv.* 116 (5 Jac. I, 1607); *Skinner vs. Gunton*, 2 Keb. 473 (21 Car. II, 1669); *Parker vs. Langley*, 10 Mod. 145, 210 (11-12 Anne, 1713); *Lewis vs. Farrell*, 1 Stra. 114 (5 Geo. I, 1719); *Morgan vs. Hughes*, 2 T. R. 225 (28 Geo. III, 1788).

all false accusations whatsoever.¹⁸ The evil effects of this policy have been already shown. They were corrected by the later doctrine of "probable cause," which has survived in full force until the present day. According to this doctrine, the defendant in an action upon the case for malicious prosecution will escape liability for the false arrest and prosecution if he can prove that the circumstances under which he ordered the plaintiff's arrest had been such as to justify a man of ordinary prudence and judgment in believing that the plaintiff was guilty of the crime charged.¹⁹

¹⁸ 2 Pollock and Maitland, "History of English Law," p. 538.

¹⁹ The evolution of the doctrine of probable cause is interesting. In *Archeboll vs. Borrell*, 3 Leon. 139, 142 (28 Eliz., 1586), Walmesley, Serjeant, states that no action lies for any "vexation by suit, if no corruption or covin be in the party who prosecutes the suit." In *Knight vs. German*, Cro. Eliz. 70 (29, 31 Eliz., 1587, 1589), the court held that no suit can be brought upon a false indictment of felony in cases where "the indictment is preferred by the party grieved, and he pursueth it according to law." But the defendant should plead that he "did it upon good presumption," else "everyone shall be in danger of his life by such malicious practices."

During the reigns of Elizabeth and James I it was several times decided that a good "ground of suspicion" constituted a sufficient justification for having preferred a false indictment. See *Pain vs. Rochester*, Cro. Eliz. 871; *Chambers vs. Taylor*, *ibid.*, 900; *Weele vs. Wells*, 3 Bulst. 284. Thus the finding by the plaintiff, in the hands of the defendant, of goods stolen from him was held a good defense (*Anon.*, Moore 600), likewise the plea of a father sued for a false charge of rape that he had believed and acted upon the statement of his young daughter (*Cox vs. Wirrall*, Cro. Jac. 193).

In *Ashley's Case*, 12 Co. 90 (9 Jac. I, 1611), the Court of Star Chamber enumerated the elements which must concur in order that the defendant in malicious prosecution might justify upon the ground of a "good cause of suspicion." (1) A felony must have been committed. (2) The arrestor must plead suspicion upon good cause, which is traversible. (3) The party who pleads suspicion must actually have arrested the plaintiff. He cannot command another to do so, since suspicion is purely personal. Common voice and rumor were said to be sufficient grounds of suspicion.

In *Payn vs. Porter*, Cro. Jac. 400 (16 Jac. I, 1618), the Court of Exchequer recognized that "the exhibiting the bill upon true and just presumptions is excusable." See also *Carlion vs. Mill*, Cro. Car. 291 (8 Car. I, 1632)—"groundless suspicion;" *Hockin vs. Matthew et al.*, 1 Sid. 463 (22 Car. II, 1670)—"without any cause."

The term "probable cause" seems to be employed for the first time in *Atwood vs. Monger*, Styles 378 (1653). There the court

Thus was the law extended to cases which the strict action of conspiracy had been unable to reach. We must now endeavor to explain the causes of the process of growth just described, and to show why the action upon the case displaced the old action by strict writ of conspiracy.

None of the defects in the older remedy were such as would necessarily prove fatal to it. Their presence alone does not suffice to 'explain the displacement of the old remedy by the new. These defects might well have been corrected within the limits of the action of conspiracy, or the two forms might have continued to exist side by side and remained mutually exclusive. But the old form of action embodied a fundamental error. This error lay in the idea that the element of combination among several persons to inflict harm upon another might in itself furnish a universally valid foundation for a civil action for the recovery of damages.²⁰

said, "And I hold that an action on the case will lye, for maliciously bringing an action against him where he had no probable cause," etc. The term recurs in the argument of Pemberton, Serjeant, in *Norris vs. Palmer*, 2 Mod. 51 (27 Car. II, 1675). It was adopted generally by the courts, and the conception denoted by it refined in the later decisions.

Until the case of *Savile vs. Roberts* had been decided, the practice was for defendants to plead probable cause as their justification. After that decision, however, it became incumbent upon the plaintiff to allege and prove affirmatively the absence of probable cause in the defendant, else the declaration would be held bad upon demurrer. This is the modern practice.

²⁰ This idea is at the foundation of the early statutes and cases. The gist of the civil action of conspiracy was the combination. No judgment could be pronounced against the defendants unless at least two were found guilty. The action had to be brought in the county in which the combination had been formed, not where the false indictment had been preferred and discharged, the reason being that the conspiracy was the "root of the fact," and acts in execution of it were "only consequences following upon this," or "matters of aggravation." During the reign of Richard II it was even said that one "might have a writ of conspiracy although they [the defendants] did nothing but the confederacy together, and may recover damages" (*Bellewe's Cases*, Temp. Rich. II). In *Cockshall vs. Mayor of Boalton*, 1 Leon., f. 189, pl. 269 (31 Eliz., 1589), the plaintiff brought suit against the mayor, town-clerks, and gaoler of Boalton for a conspiracy to delay him in recovering in an action of debt by allowing the debtor to go free without bail. It was objected by the defendants that the taking of bail is a judicial act, and can therefore give rise to no action, but

The fallacy involved in making a conspiracy the gist of a civil action is manifest. The immediate purpose of such action is to reimburse the plaintiff for some material loss resulting from the infliction upon him of a legal injury. The amount recoverable is the estimated pecuniary measure of the loss, and in some cases an additional sum by way of "punitive damages." In every instance, however, the plaintiff must have suffered actual damage from the very acts constituting the legal wrong. Now obviously a bare agreement among two or more persons to harm a third person inflicts no material hurt upon him. However malevolent the combination may be, the person against whom it is directed suffers no loss until the acts planned are actually performed. Hence the acts done and not the conspiracy to do them should be regarded as the gist of the proceeding to make good the damage. Attention should be paid primarily to the *damnum*; *injuria*, though essential to recovery, occupies a position of secondary importance as regards the procedure by which such recovery is to be had.

The form of action upon the case enabled the courts to accomplish this shift of emphasis from the conspiracy to the acts done. Its convenience and consequent popularity also led to the substitution of malice for conspiracy as the element of *injuria* in torts founded upon false prosecutions. The relation existing between conspiracy and malice in this connection is curious and instructive. The vitality of the strict action of conspiracy lay in the fact that it was devised to remedy a class of malicious injuries. The malice of the conspirators was what attracted the attention of the early lawyers²¹ and supplied the moral support of the action.

the court entertained the suit, "for the not taking bail is not the cause of the action but the conspiracy." And when the attempt was made later on to find a reliable means of distinguishing the action of conspiracy from the action upon the case in the nature of a conspiracy, one of the methods employed was to determine whether the conspiracy was the ground of action, or whether the emphasis was placed upon the acts done and the conspiracy was mentioned by way of aggravation.

²¹ Thus, Chapter 12 of the Statute of Westminster 2 (13 Edw. I, 1285), provides a remedy for malicious appeals. The Ordinance of

But noting that false and malicious indictments and appeals were always preferred by several persons acting in concert, these jurists were led to found the tortious character of such enterprises upon what is little more than a single evidence of malice, instead of malice itself. The remedy constructed under these circumstances worked very well as long as malicious prosecutions retained their original incidents. But as litigation increased, malice exhibited itself in new activities. To meet them the action upon the case was employed. The variety of malicious injuries so brought before the courts soon recalled into prominence the idea of malice as the secondary element of such wrongs. After this idea had become firmly established it was not long before its more general validity and increased scope caused the recognition of its superiority over the element of conspiracy as a constituent of tort. In a word, the strict action of conspiracy was rendered obsolete by the reappearance in the conscious thought of the times of the general conception of malice as a secondary element of tort.²² This process will now be explained in detail.

Conspirators is directed against those who "procure pleas maliciously to be moved," and those who "maliciously maintain and sustain" such pleas. Stat. 33 Edw. I defines conspirators as "they that do confeder or bind themselves . . . falsely and maliciously to indict or cause to be indicted . . . and such as retain men for to maintain their malicious enterprises," etc. There are also other statutes and cases at this period which aim to punish various injuries inflicted with malice.

²² Even in their treatment of actions upon the case wherein the right of the plaintiff to recover was explicitly based upon malice and damages, the courts at first exhibited a tendency to repeat the process of erecting into fundamental conditions for redress circumstances which were really but particular evidences of malice or measures of damages—the same process whereby the action of conspiracy had become invested with its stiff and contracted character. Manifestations of this tendency are seen in the earlier holdings that an action upon the case for a false and malicious accusation of a trespass, or for a malicious prosecution upon a defective indictment or before a court without jurisdiction to conduct the prosecution, or for a malicious accusation whereupon the grand jury had found an *ignoramus*, would not lie except in cases in which the charge involved slander or the plaintiff had suffered corporal injury or imprisonment. Of the same nature was the principle at first announced that an action for a false and malicious proceeding in the civil courts would lie only in cases in which the plaintiff had been held to excessive bail. Fortunately, the number and

So completely had the current conception of malice as the secondary element of the torts under discussion found expression in the principles governing the remedy by writ of conspiracy, and so efficient, we may be permitted to believe, was this remedy in reaching the most prominent class of malicious injuries then judicially noticed, that express reference to malice in conspiracy cases of the period from the reign of Edward II to that of Henry VII (1307-1509) practically ceased.²³ But even at this time a tacit idea of the significance of malice lingered in legal thought. Its presence may be detected in the qualified immunity from suit granted to witnesses, justices, and attorneys concerned in an unsuccessful prosecution for crime. Such persons could not be held liable for what they might do in the regular and impartial discharge of their official duties, but if they went further and took any extra-official part in the prosecution, their protection ceased. We can readily conjecture that this principle flowed from the conception of malice. Such persons, we should say today, must be presumed to act without malice so long as they confine themselves to their official duties. But this presumption does not relieve them from the consequences of improper conduct, prearranged plans, and the like, because these clearly evidence malicious intent. That this conception was the real foundation of the above immunities and marked out their limits appears in the saying of the court in the case of *Gerlington vs. Pitfield*, 21 Keb. 527 (21 Car. II, 1669):

variety of the cases compelled the courts to abandon these principles before they had become firmly established, and finally led them to adopt that general view of the nature of malice which has survived.

²³ The term "malice" occurs but twice in the Year Books for this period, and in neither instance is any especial significance attached to it (P. 17 Edw. II, f. 544; 13 Edw. II, Fitz. f. 222, pl. 25). In the "Articles Inquired of by Inquest of Office," 27 Edw. III (27 Lib. Ass. C. 44), conspirators are said to be those who combine and agree "that each will aid and sustain the enterprise of the other, be it false or true; and who falsely have people indicted and acquitted, or falsely move or maintain pleas." Here, so completely has the conception of malice received expression in the current principles relating to the action of conspiracy that even the term is lost.

"Strict proof of malice in this case of a justice is requisite, and procuring witnesses is no prosecution."

The official positions occupied by the defendants who claimed an exemption from liability in such cases, and the reasons upon which their exemption was ostensibly based,²⁴ prevented an explicit statement that malice was the real ground of action in conspiracy cases. Express recognition of the importance of malice first recurred during the reign of Henry VII, in a case wherein a false accusation had been preferred in good faith by a private individual.²⁵ Here the court said: "To each sessions all men may come for the common profit, and if they come with that intent, and for the zeal that they have for justice, and not from malice, they act sufficiently for the common profit . . . and if it was from malice, the matter would be otherwise." The idea thus suggested was taken up and developed by the courts during the reigns of James I, Charles I and Charles II. The judges employed the term "malice" more frequently. They gradually came to perceive and to state more clearly that the essential elements of the torts redressed by actions upon the case in the nature of conspiracy were the dam-

²⁴ Indictors, or members of the grand jury which found the indictment against the plaintiff, enjoyed an absolute protection from action or prosecution for conspiracy (13 Edw. II, 401; 21 Edw. III, 17 a; 47 Edw. III, 16, 17; 30 Lib. Ass. 21; 7 Hen. IV, 31). It was said that "they cannot . . . be adjudged conspirators, because they affirmed by their oaths" (27 Lib. Ass. 12; 9 Hen. IV, 9); and again, "the law understands, when a man is sworn, that he will do according to his conscience" (27 Hen. VIII, 2). In the twenty-seventh year of Edward III a witness sought to claim an immunity upon the same ground (27 Lib. Ass. 12). He pleaded that he was sworn to inform the jury, but his plea was disallowed. The qualified protection enjoyed by witnesses taking part in the false prosecution was founded, not upon their oath, but upon the fact that they were compelled by law to testify (27 Hen. VIII, 2). In this respect they occupied the same position with primers and participators in the hue and cry (20 Hen. VII, 11; 35 Hen. VI, 14). Justices and other court officials could not be sued for what they might have done in open court and in the execution of their official duties (47 Edw. III, 16, 17; 12 Edw. IV, 18; 27 Lib. Ass. 12; 9 Hen. IV, 9; 21 Edw. IV, 67), because "the law will not admit proof against this vehement and violent presumption of law that a justice sworn to do justice will do injustice" (Floyd vs. Barker, 12 Co. 23).

²⁵ Y. B., M. 20 Hen. VII, f. 11; Keilway, ff. 81 b. & 83 b.

ages suffered by the plaintiff and the malicious intent prompting the defendant's acts.²⁶ "Malice" was still used in its popular sense. It signified malevolence, "as for unjust revenge."²⁷

Contemporaneously with the gradual increase in the judicial consciousness of the importance of malice, the action upon the case was being extended to afford a remedy for false prosecutions for trespasses and for ecclesiastical offenses, for arrests in civil cases, and for prosecutions upon defective indictments and before courts without jurisdiction. This extension advanced the growth of the conception of malice, although in most of the cases of this class no express reference to malice was made. Such cases provided the courts with varied specimens of malicious acts causing damages. As the specimens became sufficiently numerous to be made the basis of generalization, it became evident that the common elements of malice and damages were the bonds connecting even the most heterogeneous of them. In the

²⁶ The growing emphasis put upon malice as an essential element in malicious prosecutions can be traced in the following cases: *Knight vs. German*, Cro. Eliz. 70 (31 Eliz., 1589); *Miller vs. Reignolds & Bassett*, Godb. 205 (Jac. I), wherein the court said that a conspiracy should be malicious as well as false, "else it is no conspiracy," wherefore malice should be proved; *Cox vs. Wirrall*, Cro. Jac. 193 (4 Jac. I, 1606); *Poulterers' Case*, 9 Co. 56 b. (8 Jac. I, 1610), nota by Lord Coke; *Payn vs. Porter*, Cro. Jac. 490 (16 Jac. I, 1618); *Smith vs. Cranshaw*, 1 Jones 93 (1 Car. I, 1625); *Taylor & Towlin's Case*, Godb. 444 (4 Car. I, 1628); *Carlion vs. Mill*, Cro. Car. 291 (8 Car. I, 1632); *Atwood vs. Monger*, Styles 378 (1653); *Norris vs. Palmer*, 2 Mod. 51 (27 Car. II, 1675); *Daw vs. Swaine*, 1 Sid. 424, 1 Lev. 275 (21 Car. II, 1669); *Hockin vs. Mathew et al.*, 1 Sid. 463 (22 Car. II, 1670); *Gray vs. Degge*, T. Jones 132 (31-2 Car. II, 1680); *Webster vs. Haigh*, 3 Lev. 40 (37 Car. II, 1684). An interesting extension of the idea as to the significance of malice in these actions is seen in *Anon.*, 2 Mod. 306 (30 Car. II, 1678), a case arising out of an indictment for a common trespass. The court said that after acquittal of the trespass the indictment should be held malicious, since the defendant might have brought a civil action for his own recompense and hence had no reason to indict the plaintiff other than to put him to charges and make him pay fees to the clerk of the assizes.

The above list comprises all the cases decided prior to *Savile vs. Roberts* in which malice had been expressly recognized as essential to recovery in actions for false prosecutions.

²⁷ Note by Lord Coke in *Poulterers' Case*, 9 Co. 56 b.

same manner the development of the doctrine of probable cause, which was rapidly progressing during the same period, and reached its practical completion during the reign of Charles II, threw much light upon the true significance of malice as an element of the torts under discussion. This doctrine supplied the courts with a much needed principle to guide them as they extended the action upon the case to new circumstances. It eventually became a fundamental condition for recovery in such actions that the plaintiff should prove that the defendant had ordered his arrest without a reasonable cause to believe him guilty. Maturer thought was not long in recognizing that the absence of probable cause is nothing but a more or less accurate test or measure of malice, thus bringing into clearer view the real part played by malice as an element of tort.

During all the period in which the true conception of the significance of malice was being slowly and painfully worked out, and for some time after it had become practically complete, the old strict action of conspiracy remained theoretically intact, although it was never resorted to. The principles relating to it were frequently stated and affirmed by the courts, even in cases in which they were basing the plaintiff's right to recovery upon the malice of the defendant. At first sight the long coexistence (in theory) of the two forms of action is surprising, in view of the superiority of the conception upon which the action upon the case was built. Two causes, however, may be assigned to account for the length of time which elapsed before the incompatibility between an action founded upon malice and the strict action of conspiracy was perceived, and the latter driven into obsolescence. The first was the fact that the courts had lost sight of the true significance of conspiracy, and had ceased to regard it as a mere evidence of malice. The term had come to connote the act commonly performed by the conspirators as well as to denote the plurality of the performers. "Conspiracy" always carried with it the suggestion of a false prosecution. For many years after the introduction of the action upon the case for malicious

prosecutions, this remedy was called "an action upon the case in the nature of a conspiracy." The writ by which it was begun always contained an averment that the false prosecution had been instituted as the result of a conspiracy—"conspiratione inde praehabita"—even in cases in which only a single defendant was named. Also, in the digests of the period between the reign of Henry VIII and that of Charles II, cases of malicious prosecution, whether against a single defendant or against several, are all listed under the caption "conspiracy." As the word had thus become a *vocabulum artis*, with a special formal meaning quite different from its primary signification, the validity of the conception expressed by it as the ground of a civil remedy was not readily perceived to be undermined by the growth in the conscious thought of the times of the conception of malice as the true secondary element of actionable false prosecutions.

The second reason was the fact that this conception of the importance of malice was worked out through the medium of the action upon the case, which began to be employed as a remedy for false accusations almost simultaneously with the reappearance of that conception. For a long time the courts busied themselves in extending redress through this new form of action to the many cases in which the strict action of conspiracy was powerless to afford relief, in developing the doctrine of probable cause, and in coming clearly to base the rights of the plaintiff upon the damage suffered by him and the malice of the defendant. Not until they had arrived at a comparatively matured conception of the significance of malice in such cases did the courts begin to compare the new remedy with the old, and to inquire into the relations existing between them. These considerations explain why the strict action of conspiracy was preserved from the disintegrating effects of the new conception of malice until the latter had become sufficiently developed to destroy the old action at a blow.

Comparisons between the two forms of action, leading to the analyses of their basic conceptions which proved fatal

to the older form, were first instituted, it is curious to note, as a direct result of the conservatism of the courts in retaining the name and as many as possible of the attributes of the older action while developing the new. It was often important to determine whether the action brought was an action of conspiracy or an action upon the case.²⁸ The similarity of the two proceedings made necessary a close examination of their fundamental characteristics in order to distinguish them. The discussions thus inaugurated, though at first productive of a great deal of confusion and contradiction, revealed the vital differences between the two remedies. The result was the establishment of the broad principle that the action of conspiracy should be confined to cases wherein there had been a combination such as would subject its members to the villanous judgment; that is, a combination falsely and maliciously to indict of a capital crime. In such cases, if the action were based upon the conspiracy as the principal element of the wrong, the other facts being alleged by way of aggravation, it was an action of conspiracy. In all cases in which the false accusation had been preferred by a single defendant, or even in which a conspiracy was alleged but the emphasis was placed upon the acts causing the damage, the mention of the conspiracy being by way of aggravation, the proceeding was said to

²⁸ Thus, the localities in which the two actions should be brought differed. An action of conspiracy was cognizable by the court having jurisdiction over the place in which the combination was formed; an action upon the case, in the jurisdiction in which the malicious prosecution took place. So, too, the jury which tried an action of conspiracy had to be drawn from the several vicinages in which the conspiracy had been entered into and put into execution, whereas the jury in an action upon the case need come only from the vicinage in which the case was tried. It may be said generally that in actions of this character, for prosecutions alleged to have been instituted by a combination of persons, it would frequently happen that all the defendants but one would be acquitted, or the plaintiff would be unable to show that he had been acquitted upon the alleged false charge, or the like. The defendant would then move in arrest of judgment that the proceeding was an action of conspiracy and that he could not be held alone, etc. In such an event the fate of the action depended upon which form of action the court held it to be; hence the importance of distinguishing between them with certainty.

be an action upon the case.²⁹ In this manner the two forms of action were drawn into sharp contrast with each other.

²⁹ This method was first suggested in *Smith vs. Cranshaw*, Palm. 315 (1 Car. I, 1625), an action upon the case for a false and malicious accusation of having uttered treasonable words. The question had been raised whether the jury should be drawn from the county in which the conspiracy had been formed, or partly from that county and partly from the county in which the concerted design had been executed. Dodd, J., believed "that the action will be brought and tried where the conspiracy, which is the root of the fact, is laid; for the others are only consequences following upon this." He held further that the damages "will be equal and entire; because the conspiracy is the cause, and all are found guilty together." Ley, C. J., agreed that "if the conspiracy only had been the offense, there the visne will be where the conspiracy is committed."

Skinner vs. Gunton, T. Raym. 176 (21 Car. II, 1669), is a leading case in this connection. An action upon the case had been brought against three defendants for a conspiracy to have the now plaintiff arrested in a grand action of debt. Only one defendant being found guilty, his attorney argued in arrest of judgment that the proceeding was an action of conspiracy, wherein a single defendant cannot be held. A majority of the court held that it was an action upon the case, the reason being that "the substance of the action was the undue arresting of the plaintiff, and not the conspiracy" (1 Saund. 227). The same idea is expressed in another report of the same case (1 Vent. 12): "Here 'tis rather in the nature of an action upon the case, and the conspiracy alleged by way of aggravation." In still a third report (2 Keb. 497) we are told: "The court said, the writs being the same, it's one or the other, as the plaintiff titles it, albeit the word conspiracy be used; and according to the offense, if felony conspiracy; if but trespass, action upon the case." Here the action was entitled "*In placito transgressionis super casum*" (1 Vent. 18). Three years later the case reappears, and it is laid down (3 Keb. 118), "*In placito transg. quod conspiraverunt or indictari procuraverunt*, if trespass be the principal and this but for aggravation of damages, finding one guilty is sufficient, but in a bare conspiracy not, though no villanous judgment be given."

The above principles were discussed and reaffirmed in *Rex vs. Thode*, 3 Keb. 111 (24 Car. II, 1672), in the following words: "In an action on the case for disceit, conspiratione inde habita, one may be convicted alone, but when it is an action upon the case quod conspiraverunt, one alone cannot be convicted." In another report (1 Vent. 234) of this case we find that "Wild said: The difference was, where the suit was upon conspiracy wherein the villanous judgment was to be given, and where the conspiracy is laid only by way of aggravation; as in this case. Hale said it would be the same in an action against two upon the case for conspiracy; but not in such actions where there be a charge of conspiracy, yet the gist of the action is upon another matter."

The inconsistency and inaccuracy of the language employed in the above decisions bear striking testimony to the confusion of thought which lingered in the minds of the judges. Still, the main ideas intended to be conveyed are clear enough in their broad outlines.

So stood the law when the great case of *Savile vs. Roberts*, 9 and 10 William III (1698), arose. In this decision, which supplies the foundation of modern doctrines relating to malicious prosecution and is still quoted as a leading case, the various principles which we have been discussing separately were woven into a single, harmonious fabric. The transition to the conception of malice and damages as the true essentials for recovery in actions upon the case for malicious prosecution was completed. Confusion of thought resulting from the numerous attempts of former times to inject principles valid within the field of the action of conspiracy into the field of the action upon the case was cleared away. The inadequacy of the mere conspiracy as the foundation of a civil action was pointed out, and the triumph of the new proceeding over the old was openly recognized.

Roberts brought an action upon the case in the Court of Common Pleas against *Savile*,⁸⁰ alleging that the latter "maliciously and wickedly intending to oppress the plaintiff, caused him to be maliciously indicted of a riot," and recovered a judgment for £11 damages. The defendant then sued a writ of error into the Court of King's Bench, where, after several arguments, the judgment of the lower court was affirmed. Lord Holt, in his opinion, emphasized the principle that the damage suffered by the plaintiff was the true ground of the action. If a person suffer loss by reason of a false and malicious prosecution, "it is reason and justice that he should have an action to repair him the injury; though of late it has been questioned, yet it has always been allowed formerly. . . . But it may be objected against the authority of the old books that these actions were grounded upon a conspiracy, which is of an odious nature; and that without conspiracy they are not maintainable; but to this it is answered that the conspiracy was nothing in these cases; that was not the ground of these

⁸⁰ 12 Mod. 208.

actions, but the damage sustained by the party;⁸¹ for if there be never so great a conspiracy to indict a man, yet if nothing be done in pursuance of that conspiracy, the party can have no action. . . . Now if a man be prosecuted maliciously for trespass, either with or without a conspiracy, it is the same thing; the trouble and expense is the same; and I take it that wheresoever an action of conspiracy is maintainable against two, there if it be a malicious prosecution by one, case will lie. These actions of conspiracy in the old books were really but actions upon the case: but conspiracy properly so-called does not lie unless the party were indicted of a capital crime."⁸²

Lord Holt says further that malicious acts causing damage always give the injured party a right of action, even in some cases where the malicious prosecution is a proceeding in the civil courts. Still, he cautions,⁸³ "though this action does lie, yet it is an action not to be favored, and ought not to be maintained without rank and express malice and iniquity. Therefore, if there be no scandal or imprisonment, and ignoramus found, no action lies, though the matter be false; yet if the indictment be fairly prosecuted, no action lies; so if the court has a jurisdiction, though the matter be scandalous, yet if there be no malice, no action lies. But

⁸¹ It must be borne in mind that Lord Holt is speaking of actions upon the case, not of actions of conspiracy. Though the foundation of the latter, as well as of the former, was really the damage done to the plaintiff by the false accusation, the conspiracy was nevertheless considered an integral part of the wrong to be redressed. See note 20, p. 37.

⁸² The remainder of this passage, in which Lord Holt further contrasts the two actions, is as follows: ". . . unless the parties were indicted of a capital crime (F. N. B. 116), in which action of conspiracy properly so-called, if it be brought against two, and the one found guilty, and the other acquitted, no judgment can be given against him who is found guilty. . . . And no villanous judgment shall be given, but where a conspiracy was to take away a man's life; and conspiracy, though nothing be done thereupon, is a crime and punishable at the suit of the King. But where the conspiracy is only to indict a man for a misdemeanor, though the action be against two, and only one is found guilty, yet judgment shall be against him, as in the case of trespass; for really it is an action on the case, and no action of conspiracy" (5 Mod. 394. 408).

⁸³ 12 Mod. 211.

in the case before us the verdict has found express malice; and therefore judgment ought to be affirmed."

The same points arose again in the case of *Jones vs. Gwynn*,³⁴ decided a few years later, wherein an action upon the case had been brought upon a false and malicious indictment for following the trade of "corn-badger" without a license. The above doctrines were reaffirmed and applied, with extensions and improvements.

These two cases mark the culmination of the long process whereby the courts had been gradually unfolding the basic principles relating to the action upon the case for malicious prosecution as it exists today. The courts clearly and authoritatively announce that not conspiracy, but damages flowing from the malice of the defendant, are essential requisites for recovery. The old action of conspiracy was not in terms declared obsolete. But the action upon the case was so broadened in its scope that it became available to redress not only wrongs beyond the operation of the older remedy, but also torts which the old action might still reach; and in competition with the new form of action the action of conspiracy immediately succumbed. Henceforth the activities of the courts are confined to clearer statements and to logical extensions of the principles laid down in the above cases. The terms employed receive further elucidation. A more objective conception of malice, making the latter nearly coextensive with absence of legal excuse, is evolved, and the significance of probable cause and other evidences of malice is discussed.³⁵ These matters,

³⁴ 10 Mod. 148, 214; *Gilb. Cases, Law & Eq.*, 185.

³⁵ Clearer and more general statements that the elements of the tort of malicious prosecution are malice, innocence, and damages: *Jones vs. Gwynn*, 10 Mod. 214 (1713); *Chapman vs. Pickersgill*, 2 Wils. 145 (1762); *Goslin vs. Wilcock*, 2 Wils. 302 (1765); *Purcell vs. McNamara*, 9 East 361 (1808). Malice as absence of legal justification: *Jones vs. Gwynn* (supra); *Sutton vs. Johnstone*, 1 T. R. 493 (1786). Analysis of the conception of "probable cause," etc.: *Muriel vs. Tracy*, 6 Mod. 169 (1704); *Jones vs. Gwynn* (supra); *Farmer vs. Darling*, 4 Burr. 1971 (1766); *Purcell vs. McNamara* (supra). Anything may be employed as an instrument of malice: *Chapman vs. Pickersgill* (supra); *Chambers vs. Robinson*, 1 Stra. 691 (1726).

however, fall outside of our province. Our interest in the doctrines worked out by the civil courts ceases with the disappearance of the conception that conspiracy is in itself a constituent element of tort. From this time on our attention will be centered upon the criminal aspect of conspiracy, until at the end of the nineteenth century the results flowing from the decision of *Allen vs. Flood*,³⁶ coupled with certain modern industrial conditions, again force the conception of conspiracy to occupy a position of prominence in civil cases.

³⁶ 77 L. T. Rep., N. S., 717 (1898).

CHAPTER III.

THE CRIMINAL LAW OF CONSPIRACY, FROM THE REIGN OF EDWARD I TO THE BEGINNING OF THE NINETEENTH CENTURY.

Although the Ordinance of Conspirators (21 Edw. I) and the *Articuli super Chartas* (28 Edw. I) were intended to deal with the civil remedy for conspiracy, they both contain elements of a criminal nature.¹ There is also a clause in the Definition of Conspirators which evidences a criminal liability for the offense.² Not until the fourth year of the reign of Edward III (1330), however, was a statute passed devoted exclusively to the criminal aspect of conspiracy. This statute is as follows: "Item, Where in times past divers people of the realm, as well great men as other, have made alliances, confederacies, and conspiracies, to maintain parties, pleas, and quarrels, whereby divers have been wrongfully disinherited, and some ransomed and destroyed, and some for fear to be maimed and beaten, durst not sue for their right, nor complain, nor the juries of inquests give their verdicts, to the great hurt of the people, and slander of the law and common right; it is accorded, That the justices of the one bench and of the other, the justices of assizes, whensoever they come to hold their sessions, or to take inquests upon *nisi prius* shall inquire, hear, and determine, as well at the King's suit, as at the suit of the party, of such maintainers, bearers and conspirators, and also of

¹ The infliction of penalties of fine and imprisonment upon persons found guilty of conspiracy in a civil proceeding, in addition to the damages awarded to the plaintiff, does not fall in with our modern ideas respecting the separation which should be made between civil and criminal procedure.

² The significance of the direction contained in the Definition that "Justices assigned to the hearing and determination of felonies and trespasses should have the transcript hereof" has already been alluded to. See *supra*, p. 10.

them that commit champerty, and of all other things contained in the aforesaid article, as well as justices in eyre should do if they were in the same county. And that which cannot be determined before the justices of the one bench or the other upon the *nisi prius*, for the shortness of time, shall be adjourned into the place whereof they be justices, and there be determined as right and reason shall require."³

Fourteen years later (18 Edw. III, 1344) it was enacted by Parliament that exigents should be awarded against "conspirators, confederators, and maintainers of false quarrels."

The above statutes do nothing more than improve the criminal procedure relating to the prosecution of conspirators. The common law, as has been shown, had already raised a criminal liability against conspiracy. The content of that offense was described in the Definition of Conspirators. It was left for the courts gradually to expand and improve the law applicable to illegal combinations and to adapt it to changing conditions until they brought it to the position which it now occupies.

During the period between the reign of Edward I and that of Charles II the criminal aspect of conspiracy was far less important than the civil. With the exception of several cases reported during the reign of Edward III, the books record practically no criminal prosecutions for conspiracy.⁴

³ Of this statute Wright ("The Law of Criminal Conspiracies," p. 14, n. 7) says, "The 4th Edw. 3 C. 11, made conspiracy effectively criminal, by directing the justices of either bench or of assize in sessions to hear and determine conspiracies and maintenances." But it does not in reality create an entirely new criminal liability for conspiracy. The very terms of the act evidence a pre-existing liability. It will be noted that justices at *nisi prius* are simply invested with the jurisdiction already exercised by justices in eyre. If, therefore, this statute rendered conspiracy for the first time "effectively criminal," it must have done so by improving the machinery for prosecution.

⁴ The criminal prosecutions for conspiracy reported in the Year Books are: 22 Lib. Ass., C. 77; 24 Edw. III, 75; 26 Lib. Ass. f. 131 (pl. 62); 27 Lib. Ass. 12, 73, 74, 59, 138 (ch. 44); 28 Lib. Ass. 12; 30 Lib. Ass. 21; 9 Hen. IV, f. 9.

The narrow scope of the offense of conspiracy during this period is shown in 24 Edw. III, f. 75 (1351). Here was a presentment for conspiracy to imprison a man until he should pay a fine.

In the few such cases which we do find, the conceptions worked out by the courts in connection with civil actions of conspiracy were closely followed. The offense included only combinations to pervert justice. The combination was not punishable apart from the act performed. The same immunities were enjoyed by indictors, justices, and witnesses. The party injured must have been acquitted by verdict. In general, the principles governing the civil and the criminal proceedings were substantially the same.

The expansion of the criminal law of conspiracy began during the reign of Edward III, was accelerated in the time of Elizabeth and James I, and had made its most important progress by the end of the reign of George III. In comparing this course of evolution with that undergone by the civil law of conspiracy we are struck with two main differences. First, the principle that several persons should be punished criminally for engaging in a mere combination to do evil is sound. Second, although the growth of the criminal law was influenced and hampered by the narrow conceptions at the basis of the civil law of conspiracy, it encountered no difficulties flowing from a technical form of procedure which had to be respected.

Our treatment of the development of the criminal law of conspiracy will be divided into two parts: First, we shall

Upon a petition in the Court of King's Bench to reverse the judgment, the court said: "And because neither year, nor day, nor place is averred, . . . and moreover because the principal matter of the conspiracy alleged is not conspiracy, but rather damage and oppression of the people. Wherefore we reverse and annul the judgment."

In 40 Edw. III, f. 19, Thorpe, J., admitted that where the conspiracy had been entered into in one county and executed in another the king could not maintain an indictment in the first county, although a private plaintiff could pursue his remedy by writ of conspiracy in that county. The reason, he says, is "that the suit of the party in such a case is broader than the suit of the King."

The only other criminal proceedings against conspirators of which we have any account until the time of Charles II are a few cases in the Court of Star Chamber during the reigns of Elizabeth, James I, and Charles I. See note 7, p. 55.

The first of the modern prosecutions for conspiracy seems to be *Rex vs. Timberley & Childe*, 1 Sid. 68, 1 Lev. 62 (13-14 Car. II, 1662).

trace the rise of the principle that the bare unexecuted conspiracy is a complete offense; second, we shall show how the classes of combinations punishable as conspiracies increased.

The language of the Definition of Conspirators is broad enough to include combinations which have performed no act. It appears, however, that an unexecuted agreement to do evil was first declared punishable during the reign of Edward III,⁵ and by an unsupported judicial determination.

⁵ In the Book of Assizes, 27 Edw. III, ch. 44, f. 138, we find the following (Art. 5): "Item of those who retain people with their liveries or fees to suppress the truth, and to maintain their evil enterprizes, etc. . . . And nota, that two were indicted of confederacy, each of them to maintain the other, whether their matter were true or false, and notwithstanding that nothing was supposed as put in action, the parties were put to answer, because this thing is forbidden in the law." This article, as its language indicates, was founded upon the Definition of Conspirators. The offense described in the nota represents a natural, though unmistakable, extension of the terms of the Definition.

The subsequent history of this new offense of confederacy, as distinguished from conspiracy, is an interesting illustration of the methods of legal development. A difference between the two offenses was recognized in a number of later cases: 27 Lib. Ass., ch. 44, Item 6 (apparently based upon item 5, *supra*); 28 Lib. Ass., f. 12; 29 Lib. Ass., f. 166, pl. 45. See also the language of the Commission of Oyer et Terminer ("de omnibus coadunationibus, confederationibus et falsis aligantiis").

In the Poulterers' Case the court once or twice uses conspiracy and confederacy synonymously. But a careful reading of the whole opinion reveals that the court is sensible of a difference between conspiracy and the offense then before them, and inclines to call the latter "confederacy." This is the term employed by Lord Coke in his nota.

Windham, J., in *Rex vs. Sterling*, 1 Keb. 675 (1664), carefully distinguishes the offenses, and says that Sterling and his companions were guilty of confederacy "as in the Poulterers' Case." Twisden, J., however, says, "The false alliance or binding by oath is but a further degree of conspiracy, which is all one and synonymous with confederacy, and of which the assembly and consultation is a sufficient fact." But in *Reg. vs. Best*, 6 Mod. 185 (1704), Lord Holt recognizes the distinction in these words: "This indeed is not an indictment for a formed conspiracy, strictly speaking, which requires an infamous judgment, and loss of *liberam legem*, as upon conviction on an attain, and for which an indictment will not lie until acquittal or an *ignoramus* found. But this seems to be a conspiracy late loquendo, or a confederacy to charge one falsely, which sure without more is a crime," etc.

The above facts possess a deep significance. They indicate that "conspiracy" had a special meaning of its own. Hence, when other combinations than agreements falsely and maliciously to in-

Moreover, this declaration took place in connection with the offense of "confederacy," which, though apparently within the terms of the Definition of Conspirators, had become differentiated from "conspiracy" strictly so called, and embraced combinations to commit maintenances of various kinds.

There is an obiter dictum upon the subject of unexecuted conspiracies in a case anno 19 Richard II (1395)⁶ arising out of a civil action upon writ of conspiracy. Waddell, J., said: "A man will have writ of conspiracy although they did nothing but the confederacy together, and they will recover damages, and may be indicted of this also, and sic nota."

The great impetus toward the principle that an unexecuted conspiracy is criminal came from several cases decided in the Court of Star Chamber at the beginning of the seventeenth century.⁷ The act creating this extraordinary

dict of felony were brought to the attention of the courts, they were punished under the name of "confederacy." Thus it appears that this new offense bore practically the same relation to the criminal law of conspiracy that the action upon the case bore to the civil law. Under cover of "confederacy" the courts were able to develop new principles relating to unlawful combinations, the most notable being that the mere act of combination is criminal, which is at the very foundation of the modern law upon the subject.

As long as the dominance of the civil action of conspiracy served to keep alive the technical meaning of conspiracy, the latter offense remained distinct from confederacy. With the decadence of the old civil proceeding before the newer "action upon the case," however, the term "conspiracy" gradually lost its former narrow signification. The dividing line between it and confederacy became confused, and the two terms were often used synonymously (as in the *Poulterers' Case* and *Sterling's Case*). By means of this interchangeability of the words, "conspiracy" was enabled to appropriate the conceptions proper to "confederacy." Finally the latter, having vastly enriched the law of illegal combination by the infusion of the principles worked out under the protection of its name, lost its separate existence; and the crime of conspiracy was made to include all criminal agreements whatsoever.

⁶ *Bellewe's Cases*, Temp. Rich. II, p. 80, pl. 108.

⁷ The first of these Star Chamber decisions was *Glaseour vs. Hurlstone*, Gouldsb. 51 (pl. 14), 1587, in which "it was overruled by the lords, that if a jury at the common law. . . give their verdict, although they make a false oath, yet they shall not be impeached by a bill in the Star Chamber: But if any collateral

tribunal⁸ was held to have invested it with plenary jurisdiction over all wrongs perpetrated by combinations of persons. Influenced no doubt by the precedents supplied by confederacy cases and by the theoretical importance assigned to the element of combination in civil actions of conspiracy, as well as by the conditions of the times, the judges of the Star Chamber soon came to look upon the conspiracy itself as the "principal matter" to be noticed. The extreme flexibility of proceedings in this court and the broad scope of its authority permitted a free development of the tendency just mentioned. The result of the interaction of these conditions can be seen in a line of decisions

corruption be alleged in them, as that they took money or bribes, a bill shall lye thereof well enough."

In *Amerideth's Case*, Moore 562 (1600), certain tenants had combined and made joint obligations to contribute to maintain suits against their lord compelling him to grant copyhold estates to the heirs of the holders. "They were fined for the combination, and the maintenances, and the taking of the obligations one from the other." In *Lord Grey's Case*, Moore 788, pl. 1088 (1607), certain tenants had joined in a petition to the king to obtain the benefit of a similar custom of the manor in respect to copyhold estates, and had agreed to share the expense ratably among them, and had signed a blank paper, giving authority to one Perkins to fill in what petition he pleased. The Star Chamber held this agreement illegal. "And Popham said that an illegal combination is not justifiable although the complaint is . . . For the blank they seem all to be censurable, because it is an illegal combination, although the complaint is not censurable, because made to the King who has power to redress it; and the complaint is not made with terror, nor for a thing apparently illegal." In these two cases we seem to find the germ of the later doctrine that a conspiracy renders unlawful that which it is perfectly legal for one person to do.

Scroggs vs. Peck and Grey, Moore 562, pl. 765 (1600), was grounded upon agreement to file a false bill in chancery against a third person. The scheme was abandoned, but notwithstanding this the parties were fined for the matter of agreement in prejudice of a third person without his privity.

Miller vs. Reignolds & Basset, Godb. 205, and *Floyd vs. Barker*, 12 Co. 23 (1608), are not important for our present purpose. The next case in point of time is the *Poulterers' Case*. It was followed by *Ashley's Case*, 12 Co. 90, in the following year. The last Star Chamber decision upon conspiracy was *Taylor & Towlin's Case*, Godb. 444 (1628), in which the court entertained a bill of conspiracy for a false indictment before a tribunal whose jurisdiction was not distinctly alleged, "because the conspiracy was the principal thing tryable and examinable in this court, and that was well laid in the bill."

⁸ St. 3 Hen. VII, C. 1.

culminating in the famous Poulterers' Case,⁹ anno 8 James I (1610), wherein, after a full discussion of the law, it was said that a bare conspiracy is punishable independently of any act done in execution of it.

The plaintiff in the Poulterers' Case had instituted proceedings in the Star Chamber against the defendants for a conspiracy falsely to charge him with robbery, upon which charge the grand jury had returned an *ignoramus*. The defendants relied upon the settled principle of the common law that no action or indictment for conspiracy could be entertained unless the plaintiff had been legally acquitted by verdict. The court, however, refused to dismiss the bill. After stating that at common law an innocent person was protected by the bill *de odio et atia* in the interval between the laying of a charge and the finding of an indictment, the judges say: "And it is true that a writ of conspiracy lies not, unless the party is indicted and *legitimodo acquietatus*, for so are the words of the writ; but that a false conspiracy betwixt divers persons shall be punished, although nothing be put in execution, is full and manifest in our books." The authority cited in support of this proposition consists in (1) the confederacy case above referred to, which appears in Item 5 of the Articles Inquired of by Inquest of Office, anno 27 Edward III (1354), and the language of Items 6 and 19 of the same articles; (2) the anonymous case anno 19 Richard II (1395), also mentioned above; (3) the clause in the usual Commissions of Oyer and Terminer giving the commissioners the power to inquire "*de omnibus coadunationibus, confoederationibus et falsis alligantiis*." The court continues: "In these cases before the unlawful act executed the law punishes the coadunation, confederacy, or false alliance, to the end to prevent the unlawful act . . . and in these cases the common law is a law of mercy, for it prevents the malignant from doing mischief, and the innocent from suffering it." After a hearing, therefore, the defendants were punished by fine and imprisonment, and

⁹ Co. 56 b.

one of them was branded in the face with the letters "F. A.," for "false accuser."

Although the judges profess to base their decision in this case upon the common law, the *Poulterers' Case* represents a long step in advance of existing principles. The precedents cited do not sustain the decision. The language employed in the Articles Inquired of by Inquest of Office (27 Lib. Ass., Ch. 44), the case there noticed, and the terms of the Commission of Oyer and Terminer, all apply to confederacy—a combination for an evil purpose, to be sure, but one quite different in its nature from conspiracy strictly so called.¹⁰ The dictum cited from the case anno 19 Richard II was undoubtedly erroneous in so far as it applied to the civil action of conspiracy, and we have every reason to believe that it was an equally inaccurate statement of the doctrine relating to the criminal aspect of the offense. On the other hand, the holding in the *Poulterers' Case* was utterly opposed to the notion common at that time to both the civil and the criminal law of conspiracy that the offense was not complete until the person injured had been indicted, tried, and acquitted by the verdict of twelve men.

It is to be noted, however, that the importance of this decision lies not so much in what is contained in the ratio decidendi as in the manner in which the doctrines laid down in it were understood and applied. The general statement that conspiracy in itself is punishable is obiter dictum. The case really decides nothing more than that persons guilty of concerted efforts to secure the conviction of an innocent person upon a capital charge may be punished for conspiracy, although the false prosecution end otherwise than in an acquittal by verdict.¹¹ This principle is consonant with those of the common law as explained by Bracton and

¹⁰ See note 5, p. 54.

¹¹ To his report of the *Poulterers' Case* Lord Coke appends the following comment: "Nota, reader, these confederacies, punishable by law before they are executed, ought to have four incidents: It ought to be declared by some manner of prosecution, as in this case it was, either by making of bonds or promises one to the other; 2 . . . malicious, as for unjust revenge, etc.; 3 . . . false against an innocent; 4 . . . out of court, voluntarily."

declared in the Edwardian statutes of conspiracy.¹² The extension given to the criminal law by the Poulterers' Case, so interpreted, was practically identical with the contemporaneous advances being made by the civil law relating to the same class of offenses under cover of the remedy by action upon the case. In the later cases, however, the principle broadly laid down that the bare conspiracy is punishable was looked upon as having been settled by this decision. A doctrine probably valid as to a limited class of evil combinations thus came to be extended over the entire field of such enterprises. The Poulterers' Case, therefore, in view of the effects actually produced by it, must always be regarded as one of the historic landmarks upon the highway of English legal history.

The Poulterers' Case was cited and confirmed in Ashley's Case¹³ (9 Jac. I, 1611) and in Tailor and Towlin's Case¹⁴ (4 Car. I, 1628), both Star Chamber cases, in which the facts were identical in principle with those of the earlier case. The statement that an unexecuted conspiracy is an offense punishable is met with for the first time in the Court of King's Bench in an obiter dictum in Bagg's Case¹⁵ (13 Jac. I, 1615). It was repeated, again obiter, upon the authority of the Poulterers' Case, in Smith vs. Cranshaw;¹⁶ also in Rex vs. Timberly¹⁷ (13-14 Car. II, 1662), wherein, as in the Poulterers' Case, acts had been performed in execution of the conspiracy, but the enterprise had not been such as would constitute a formed conspiracy in the strict sense. In Rex vs. Starling (or Sterling), however, another case of surpassing importance, decided anno 15 and 16 Charles II (1664), it was authoritatively laid down, upon

¹² In Sydenham vs. Keilway, Cro. Jac. 7 (1574). It was said obiter that where two conspire to indict a person falsely, and the grand jury returns an ignoramus, no writ of conspiracy lies "because he never was indicted nor acquitted; yet he may be indicted upon conspiracy at common law for this false conspiracy and misdemeanor, which is punishable at common law."

¹³ 12 Co. 90.

¹⁴ Godb. 444.

¹⁵ 11 Co. 93 b.

¹⁶ Palm. 315.

¹⁷ 1 Sid. 68.

an appropriate set of facts, that a conspiracy is a crime quite apart from anything done to carry out its purpose.

An information had been laid against Sterling and others, brewers of London, charging that in pursuance of an illicit conspiracy to impoverish the king's excisemen they had given orders that no more little "servois," called "gallon-beer," a commodity largely consumed by the poor, should be brewed; and that ale should be sold only at a certain price. By these means, it was alleged, the defendants designed to excite the common people to violence against the excisemen, in order that the latter might be impoverished and so disabled to pay their rent to the king. Upon a plea of not guilty the defendants were found guilty of assembling and consulting to impoverish the excisemen, but not guilty of the other facts charged. The prisoners' counsel accordingly made a motion in arrest of judgment, arguing that the only fact found was the conspiracy, and that the only conspiracies punishable without overt act "must be such as concern the public, which does not appear here in this general charge, but an injury to the fermors by particular name."¹⁸

Counsel for the king replied that since the effect of impoverishing the fermors of the excise would be a diminution of the king's revenue, this conspiracy was a great offense "of public concernment." Moreover, a conspiracy to injure any third party is punishable. Again, although the mere conspiracy is an act *ad intra*, the communication of it is an overt act, punishable "though nothing ensue thereon." The conspiracy is the crime, and the other acts are but "particular instances of it," of value only as evidence.

The court unanimously overruled the motion. Keeling, J.,¹⁹ was of the opinion "that this bare conspiracy is a great crime, where it is to do that which is evil, although to a private person; so is the Poulterers' Case." But the conspiracy in question, he continued, was of a public nature, as it touched the king's revenue. Windham, J., "conceived

¹⁸ 1 Keb. 655.

¹⁹ 1 Keb. 675.

it a point of weight and difficulty. . . . They are acquitted of conspiracy, which properly is where it's to indict men for their lives, and this is that whereon the writ lieth; but the false alliance and union by mutual swearing to maintain quarrels, is rather a confederacy. Also . . . if it were a conspiracy, there ought to have been some overt act expressed; as if H. be indicted for forestalling, or being a common thief, or barrator, or conspirator, and as to this there is no difference betwixt indictment and an action or information; I do conceive the defendants found guilty of confederacy, as in the Poulterers' Case." After stating that the offense contemplated by the present conspiracy was of a public nature, he continued: "I agree that general confederacy, without designment to public or private end, is punishable by action upon the case . . . or by indictment, in 19 Rich. II in Poulterers' Case is according [sic]; and therefore I do conceive here is enough found to give judgment against them for a confederacy, by their assembling together, their consultation and conspiracy, which is as much a false alliance as if they had bound themselves by oath."

Twisden, J., held that the defendants were guilty "of an unlawful assembly, and of a conspiracy. . . . Also, intent, while private, is fluctuating, and so cannot be punished, but when it's declared by act, it's punishable; also, *voluntas non reputabitur pro facto* . . . that is, it shall not be punished so fully, but it is still punishable: The false alliance or binding by oath is but a farther degree of conspiracy, which is all one and synonymous with confederacy, and of which the assembly and consultation is a sufficient fact." Sterling was accordingly fined £1000, the others £300 each.

The language of the court is confused in parts, but several points stand out clearly: (1) The declaration that the mere combination to do evil is a crime is part of the *ratio decidendi*. (2) This principle is based upon *obiter dicta* in the Poulterers' Case and in Bagg's Case, and is not supported by what was actually decided in these cases. (3) Although Windham, J., correctly distinguishes between confederacy and conspiracy, the tendency to widen the prin-

ciples applicable to the former until they should include all unlawful combinations, and to embrace the latter within the term "conspiracy," is plainly apparent. (4) The real advance shown by this case over the Poulterers' Case lies in the nature of the overt act decided to be necessary to evidence the conspiracy: whereas the overt act in the Poulterers' Case was an unsuccessful prosecution, the overt act in Sterling's Case was the mere consultation and agreement. (5) The modern view as to the nature of the offense and the connection between the conspiracy and the acts done appears for the first time.

In several cases decided soon afterward, however, the court seemed to hesitate to apply the doctrine of Sterling's Case. In *Rex vs. Tayler and Gard*²⁰ the punishment of the defendants was lightened because the conspiracy had been unsuccessful. In *Rex vs. Armstrong et al.*,²¹ counsel for the defense argued that a bare conspiracy without overt act is not indictable, and cited the Poulterers' Case. The court answered that there had been "as much overt act as the nature and design of this conspiracy did admit," instead of making the obvious rejoinder that the conspiracy itself was the crime. And in *Rex vs. Parkehurst et al.*²² the court even declared obiter that an information for conspiracy would not lie unless an overt act be proved.

The law was settled finally by Lord Holt. Even this great judge, however, experienced some vacillation of mind before arriving at a final conclusion. In *Savile vs. Roberts*²³ he declared obiter that "conspiracy, though nothing be done thereupon, is a crime, and punishable at the suit of the King." But in *Reg. vs. Daniell*²⁴ he agreed with counsel for the defense that a conspiracy to prosecute an innocent man upon a false criminal charge is not indictable unless executed, although he seemed to think that a conspiracy to rob or kill a man, or to charge him with the

²⁰ 3 Keb. 399 (20 Car. II, 1668).

²¹ 1 Vent. 305 (28-9 Car. II, 1677).

²² 3 Keb. 799 (29 Car. II, 1677).

²³ 12 Mod. 208, 209.

²⁴ 6 Mod. 100 (2 Anne, 1703).

paternity of a bastard child, might be punishable without more.²⁵

Lord Holt's ultimate opinion is to be found in the great case of *Reg. vs. Best et al.* (1704-5). The defendants had been indicted for a conspiracy to extort money from one Pickering by falsely charging him in public places with being the father of a bastard child. A motion to quash the indictment being overruled, a demurrer was entered, upon two grounds:²⁶ (1) "That it does not appear that anything was done in pursuance of the conspiracy, and that ought to appear according to the *Poulterers' Case*." (2) The indictment contained no averment of Pickering's innocence of the charge, which averment, it was insisted, was necessary, upon the analogy of an accusation of perjury, wherein the falsity of the statement sworn to must be proved.

Lord Holt said: "Your case of perjury is not like this; for there the crime consists in the fact sworn, and the matter is indifferent until the averment of *ubi revera* comes: but here is a confederacy to charge a man falso, nequiter, malitiose, etc. . . . This indeed is not an indictment for a formed conspiracy, strictly speaking, which requires an infamous judgment, and loss of *liberam legem*, as upon conviction on an attain, and for which an indictment will not lie until acquittal or an *ignoramus* found. But this seems to be a conspiracy late loquendo, or a confederacy to charge one falsely, which sure, without more, is a crime; and it is a crime for several people to join and agree together to prosecute a man right or wrong. If in an indictment for such confederacy you proceed further, and shew a legal prosecution of the confederacy, there you must shew the event thereof, as *ignoramus* returned on the indictment, or an acquittal, or else the indictment fails; but where you rest upon the confederacy, it will be well without more."

The whole court held "that the very agreeing together to

²⁵ This conflict really disappears if we hold to the distinction between conspiracy and confederacy. It comes from using the terms synonymously.

²⁶ 6 Mod. 185.

charge a man with a crime falsely is a consummate offense, and indictable." They believed, also, that the lack of an averment of Pickering's innocence was not fatal to the indictment, and hence gave judgment for the queen. The doctrine laid down is thus summarized in another report of the case:²⁷ "The conspiracy is the gist of the indictment, and that, though nothing be done in prosecution of it, it is a compleat and consummate offense of itself; and whether the conspiracy be to charge a temporal or ecclesiastical offense on an innocent person, it is the same thing."

The case was reargued during the Easter term of the following year. The point that seemed to "stick much with the court"²⁸ was the absence of any statement that Pickering was innocent. The question of the criminality of the bare conspiracy, however, was raised again, and Weld, Serjeant, argued that such a combination "stands singly upon the intention,"²⁹ and is not criminal unless something come of it, "for it is the damage the party receives by the conspiracy that makes it criminal." The court finally held to its former decision. They cited precedents wherein "a conspiracy without any further act done had been held to be indictable."³⁰ Lord Holt said further:³¹ "If two or three persons meet together and discourse and conspire how to accuse another falsely of an offense, it is an overt act, and is an offense indictable. So if two or three meet together to conspire the death of the queen, yet though there was nothing but words passed, the very assembling together was an overt act."

The case of *Reg. vs. Best* contains a fuller discussion of the law relating to this phase of our subject than is to be found in any preceding case. Lord Holt shows deference to the ancient distinction between conspiracy and confederacy, but this distinction soon lost all importance. Confederacy so widened its scope that it came to include all un-

²⁷ 1 Salk. 174.

²⁸ 2 Ld. Raym. 1167.

²⁹ 11 Mod. 55.

³⁰ 2 Ld. Raym. 1167.

³¹ 11 Mod. 55.

lawful combinations except those comprised within the narrow class of conspiracies strictly so called. And when the decadence of the civil action of conspiracy had robbed the term "conspiracy" of its special significance, it was appropriated to all unlawful combinations and subjected to the principles worked out under the cover of the offense of "confederacy."

From the time of this decision the principle that a bare conspiracy is punishable as a crime was accepted with little question. Counsel argued for the last time against this proposition in *Rex vs. Kinnersley and Moore*³² (5 Geo. I, 1719). The objection was vigorously combatted by counsel for the king, and was brushed aside by the court with little ceremony. From this time on attention is centered largely upon the nature of the offense of conspiracy and the relation between the various elements composing it.

We turn now to a discussion of the unlawful purpose which transforms a combination into a criminal conspiracy. During the period of the dominance of the civil action of conspiracy practically no combinations were included within the offense technically so called except combinations to enter false accusations of capital crimes. In this respect the criminal courts followed the practice of the civil courts. The exceptional civil actions of conspiracy entertained during the reign of Edward III are paralleled by several exceptional criminal prosecutions during the same period. In all these criminal cases, however, the prisoners escaped punishment in one way or another. After this reign the rigidity and the narrow scope of the civil law relating to conspiracy appear to have been reflected in the conception of conspiracy in its criminal aspect.

The germinal origin of the modern law of conspiracy, looked at from the viewpoint of the illegal purpose as well as from that of the element of combination, seems to be the clause of the Definition of Conspirators relating to the retention of men in the country "with liveries or fees for

³² 1 Stra. 193.

to maintain their malicious enterprises and to suppress the truth." From this portion of the Definition sprang the offense of "confederacy," through the medium of which many important principles relating to concerted wrongdoing were developed. By the twenty-seventh year of the reign of Edward III (1364) confederacy had been made to include a combination between two persons whereby each had agreed to "maintain the other whether their matter were true or false."³³ As time went on, the scope of the offense was gradually broadened to reach other kinds of evil combinations, which later formed the basis of generalizations. But the main progress even in this direction was made possible by the above described shift of emphasis from the act to the combination as the gist of the offense. When the courts arrive at the conception that the criminality of conspiracy lies in the intent as manifested by overt acts, they can readily bring within the definition of the crime combinations for an indefinite number of objects.

The tendency to enlarge the class of unlawful combinations first operated in the direction of agreements to perform acts directly harmful to the public.³⁴ The first sug-

³³ 27 Lib. Ass., ch. 44, f. 138.

³⁴ Bagg had been removed from his office of chief burgess of the Borough of Plymouth. He complained that he had been unjustly treated. The Court of King's Bench said, "So if he intends, or endeavors of himself, or conspires with others, to do a thing against the duty or trust of his freedom, and to the prejudice of the public good of the city or borough, but he doth not execute it, it is a good cause to punish him, as is aforesaid, but not to disfranchise him" (11 Co. 93 b, 98). This passage strikingly shows the assimilation by the court of conspiracy to intent and attempt.

That the criminality of treason lies in the intent of the parties was first stated in *Blunt's Case*, 1 How. St. Tr. 1410 (43 Eliz., 1600). The solicitor-general argued that "the compassing the Queen's destruction, which by judgment of law was concluded and implied in that consultation, was treason in the very thought and cogitation, so as that thought be proved by an overt act; that same consultation was an overt act." The lord chief justice said that the act of one treasonable conspirator, "though different in the manner, is the act of all of them who conspire, by reason of the general malice of the intent."

These cases contain the elements out of which can be readily extracted the general doctrine that a bare conspiracy to do acts prejudicial to the public welfare is criminal.

gestion that combinations of this character are punishable is to be found in *Bagg's Case*³⁵ (13 Jac. I, 1615), wherein the principle is announced obiter, and without the citation of any authority. It may probably be traced ultimately to the judicial practice already adopted in reference to conspiracies to commit treason, wherein the combination, as evidencing the treasonable intent, was punished because of its direct influence upon the public weal. Such a principle fully accorded with contemporaneous opinion, which favored the protection of the rights and privileges of the king whatever might be the effect upon the conflicting interests of individual citizens. It was applied in *Sterling's Case* to a combination to reduce the king's revenue by impoverishing the fermors of the excise, and was extended in the later cases. To this principle can be attributed the illegality of the combination spoken of in *Vertue vs. Ld. Clive*,³⁶ wherein the military officers of the East India Company had sought to force concessions by simultaneously

Other combinations the criminality of which can be accounted for by this principle are: To raise the price of merchandise, *Anon.*, 12 Mod. 248 (10 W. III, 1698), *Rex. vs. Norris*, 2 Ld. Ken. 300 (1758). To raise wages, *Journeyman Tailors' Case*, 8 Mod. 11 (1721), etc.; see Chapter V. To procure a marriage between paupers for the purpose of charging another parish with their support, *Rex vs. Watson et al.*, 1 Wils. 41 (1743), *Rex vs. Herbert et al.*, 2 Ld. Ken. 466 (1759), *Rex vs. Fowler et al.*, East P. C. 461 (1788), *Rex vs. Tanner et al.*, 1 Esp. 304 (1795). To prevent the burial of a corpse, *Young's Case* (cited in *Rex vs. Lynn*), 2 T. R. 733 (1788). To solicit a witness to disobey a summons, *Rex vs. Steventon et al.*, 2 East 362 (1802). To defraud the king by false vouchers, *Rex vs. Brissac & Scott*, 4 East 166 (1803). To induce a female ward in chancery to marry a man in low circumstances (such acts constituting an interference with the jurisdiction of the Court of Chancery), *Rex vs. Locker et al.*, 5 Esp. 107 (1804), *Ball vs. Coutts*, 1 Ves. & B. 292, 296 (1812), *Wade vs. Broughton*, 3 Ves. & B. 172 (1814)—said to be "a species of robbery." To stifle a prosecution, *Claridge vs. Hoare*, 14 Ves. 59 (1807). To obtain money as compensation for the corrupt procurement of an appointment as coast waiter, *Rex vs. Pollman et al.*, 2 Camp. 229 (1809). To issue a false certificate to be used as evidence in a criminal proceeding, *Rex vs. Mawbey et al.*, 6 T. R. 619 (1796). To raise the price of government securities by circulating false rumors, *Rex vs. De Berenger et al.*, 3 M. & S. 68 (1814)—said to be "a fraud levelled against all the public."

³⁵ 11 Co. 93 b.

³⁶ 4 Burr. 2472 (10 Geo. III, 1769).

resigning their commissions. The same is true of the various conspiracies to hinder or pervert the administration of justice, to defraud the government, and generally to do acts directly harmful to the public welfare, which are so frequently met with during the eighteenth and early nineteenth centuries. This principle lends itself to the accomplishment of great extensions in the definition of conspiracy, and some of the most important innovations in the law were made in connection with cases of this character.

A second avenue of progress in the same direction was found in a line of cases, contemporaneous with the above, in which, starting from the offense of conspiracy strictly so called, the courts were gradually and naturally led to treat as criminal various combinations to defame and to extort money by blackmail. This phase of the development of the criminal law of conspiracy is closely analogous to the contemporaneous process of growth in the civil law whereby the action upon the case was made to reach new classes of wrongs. From punishing combinations to enter false charges of capital crimes it was an easy step to punish conspiracies to charge an innocent person, either in court or merely in public places, with acts amounting only to trespasses or to spiritual offenses.³⁷ At first the courts fol-

³⁷ This principle was first laid down in *Rex vs. Timberly & Childe*, 1 Sid. 68 (13-14 Car. II, 1662), wherein there had been an indictment for conspiracy to charge a person with being the father of a bastard child, with intent to extort money. The court upheld the indictment, saying that "this court has consueance of every illegal thing for which damages may come to the party as here they may, for he will be for this liable for the maintenance of the child."

The facts in *Green vs. Turnor et ux.*, 3 Keb. 399 (26 Car. II, 1674), were similar. Twisden, J., thought that the court (B. R.) had no "consueance" of the offense charged upon the prosecutor, since it was merely spiritual. "Contra by Wild and Rainsford, the information being for the conspiracy to draw sums of money from the plaintiff, not for getting the Bastard." Judgment, however, was stayed after conviction. But in *Rex vs. Armstrong et al.*, 1 Vent. 305 (1677), a similar conspiracy was held indictable. The court said that it was "a contrivance to defame the person and cheat him of his money, which was a crime of a very heinous nature."

In *Reg. vs. Daniell*, 6 Mod. 100 (2 Anne, 1703), and *Reg. vs. Best*, 6 Mod. 137, 185 (3-4 Anne, 1704-5), Lord Holt laid it down

lowed closely the analogy between cases of this nature and those in which there had been an actual prosecution in court upon the false accusation. But since practically all of these conspiracies to defame were at bottom schemes of blackmail, the attention of the court became fastened upon the intent falsely and unjustly to extort money from the injured person. Thus they came to hold generally that a combination to extort money by a false defamatory charge is a criminal conspiracy. From this principle it is an easy transition to the still broader one that a conspiracy to injure another person by any illegal means is criminal. In this direction the conception of conspiracy has been extended very far. Still, the direct connection between combinations of the character under discussion and the primitive offense of conspiracy technically so called is manifest and interesting.

Combinations to cheat or defraud are among the most numerous and important criminal conspiracies brought before the courts of the present time. The doctrine that they are criminal offenses, however, had a special origin, and was not such an obvious and natural deduction from older settled principles as were those which we have just been treating. The earlier courts exhibited a tendency to punish cheating, whether engaged in by one or by several per-

generally that a conspiracy to charge a person with a merely spiritual offense is indictable in the temporal courts. He did not look beyond the charge to the purpose for which it was preferred, although the indictment alleged that it was a scheme to extort money.

In *Rex vs. Kinnorsley and Moore*, 1 Stra. 193 (5 Geo. I, 1719), the defendants were convicted of a conspiracy to charge Lord Sunderland with an attempt to commit sodomy, in order to extort money.

Atty. Gen. vs. Blood et al., T. Raym. 417 (32 Car. II, 1680), arose out of a conspiracy to indict the Duke of Buckingham for buggery. Conviction. *Rex vs. Veal et al.*, 2 Keb. 59 (18 Car. II, 1666), was a case of conspiracy to charge with carnal knowledge. In neither of these was the purpose to extort money mentioned.

In *Rex vs. Rispal et al.*, 1 W. Bl. 368 (1760), however, Lord Mansfield described the offense as "the getting money out of a man, by conspiring to charge him with a false fact." Or, as reported in 3 Burr. 1320, "The gist of the offense is the unlawful conspiring to injure the man by this false charge" (p. 1321).

sons. The element of conspiracy, if noticed at all, was considered merely as matter of aggravation. In *Rex vs. Wheatley*³⁸ (1 Geo. III, 1760), however, Lord Mansfield held that "all indictable cheats are where the public in general may be injured; as by using false weights, measures, or tokens; . . . or where there is a conspiracy." This decision was attacked by counsel in *Rex vs. Lara*³⁹ (36 Geo. III, 1796), but Lord Kenyon recognized its authority. "There must either be a false token or a conspiracy," he said; otherwise a cheat is not indictable.⁴⁰

These cases established the principle that a cheat accompanied by a conspiracy is a crime. It was clearly the product of judicial legislation, and probably resulted from the increased importance attributed to the element of combination in other cases and the similarity between concerted

³⁸ 1 W. Bl. 273.

³⁹ 6 T. R. 565.

⁴⁰ In *Anon.*, 1 Lev. 53 (13-14 Car. II, 1662), the court advised the plaintiff in a suit to reverse a judgment on account of fraud to prefer "an information against the cheat, and also against the vintner in which the house was, in this court." Here the element of combination does not enter.

Rex vs. Thode, 3 Keb. 111, 1 Vent. 234 (1672), was a conspiracy to cheat by the use of false dice. The court (Wild, J.) said, however, that "the conspiracy is laid only by way of aggravation."

In *Rex vs. Armstrong et al.*, 1 Vent. 305 (1677), it was said that here was "a contrivance to defame the person and cheat him of his money, which was a crime of a very heinous nature."

In *Reg. vs. Orbell*, 8 Mod. 42 (1703), the indictment charged that the defendant fraudulently and per conspiracy, to cheat J. S. of his money, got him to lay a certain sum of money upon a foot-race and prevailed with the party to run booty. The court refused to quash it upon motion, "for they said that being a cheat, though it was private in the particular, yet it was public in its consequences."

In *Reg. vs. Macarty et al.*, 8 Mod. 302 (1704), and *Reg. vs. Parry et al.*, 2 Ld. Raym. 865 (1704), the cheats were looked upon as the gist of the offenses. In both cases several persons were charged, but they were in terms convicted of the cheats. No mention at all was made in the opinion of the court of the element of combination. The indictment in the *Macarty Case* charged a "combination to cheat," but in the *Parry Case* there was no reference at all to the plurality of defendants. After *Rex vs. Wheatley*, however, the element of combination became essential. See *Rex vs. Hevey et al.*, 1 Leach Cr. L. 232 (1782); *Rex vs. Pywell et al.*, 1 Starkie 402 (1816). The holding in *Rex vs. Wheatley* was in effect, though not avowedly, anticipated in *Rex vs. Martham Bryan*, 2 Stra. 866 (1729).

cheats and conspiracies to injure the public. By a further piece of judicial legislation, it was decided in the leading case of *Rex vs. Gill and Henry*⁴¹ that a bare conspiracy to cheat is a crime.

Of still later origin was the doctrine that a conspiracy to commit a crime is indictable. The statute of Henry VII (1486, C. 14), enacting that conspiracies to destroy the king and his great lords shall be punished as felonies without overt act, recites that up to that time such combinations were not punishable. In *Rex vs. Parkehurst and Eling*⁴² an information had been laid against the defendants for a conspiracy and an attempt to rob Sir Robert Gaire, and lying in wait, etc. The court said that the information would not lie in the absence of proof of an "overt act or lying in wait;" and the verdict went finally for the defendants, "there being no certain appointment of time, place or person." In a later case⁴³ Lord Holt said obiter that "if a meeting be to rob or kill, it may be indictable;" and two years afterward he also remarked,⁴⁴ again obiter, "So if two or three meet together to conspire the death of the queen, yet though nothing but words passed, the very assembling together was an overt act." These are the only instances in the old books wherein a conspiracy to commit a crime was noticed as such. Combinations of this character were not in terms declared to be punishable until the complete separation between the criminality of the combination and that of the act done had led to the general doctrine that a combination to commit any unlawful act is a criminal conspiracy.⁴⁵

The doctrine that a combination to inflict an injury upon a third person is an indictable offense cannot be traced to

⁴¹ 2 B. & A. 204 (59 Geo. III, 1818).

⁴² 3 Keb. 799.

⁴³ *Reg. vs. Daniell*, 6 Mod. 100 (2 Anne, 1703).

⁴⁴ *Reg. vs. Best*, 11 Mod. 55 (1705).

⁴⁵ The first general statement that a combination for a criminal object is itself punishable seems to have occurred in *Reg. vs. Rowlands et al.*, 2 Den. C. C. R. 364, 388 (1851). Erle, J., overruling the case of *Rex vs. Turnor*, 13 East 226 (1810), said, "An agreement to commit an indictable offense undoubtedly amounts to a conspiracy." See Chapter IV.

any one source. It was quietly accepted and applied by the courts in suitable cases without the citation of authority, and seems to have been a reflection from the other types of conspiracy, especially conspiracy to cheat, to which it bears a close affinity. The doctrine was first announced in *Rex vs. Sterling*.⁴⁶ Counsel for the king had argued that the "very conspiracy to do a lawful act to the prejudice of a third person is inquirable and punishable in B. R." Keeling, J., agreed, obiter,⁴⁷ "that this bare conspiracy is a great crime, where it is to do that which is evil, although to a private person; so is *Poulterers' Case*." Windham, J., said: "I agree that general confederacy, without designment to public or private end, is punishable by action upon the case or indictment. . . . But this is cause to mitigate the fine, that it is only private." The first case directly in point is *Rex vs. Cope*⁴⁸ (5 Geo. I, 1719), wherein there had been a conspiracy to ruin the trade of the king's card maker by bribing his apprentice to put grease into the card paste. This was followed by Elizabeth Robinson's Case⁴⁹ (1746), in which the defendants were punished for a conspiracy to marry under a false name in order to obtain the estate of the man personated. The mooted question here was whether there was sufficient evidence of a concerted intent "to do an injury to the person or estate of another." In *Rex vs. Eccles*⁵⁰ several were convicted of a conspiracy to impoverish a tailor and prevent him "by indirect means" from carrying on his trade. It appears also from *Clifford vs. Brandon*⁵¹ that Lord Mansfield considered unlawful a conspiracy to hiss an actor. Thus the principle that combinations illegally to oppress or injure a third person are punishable had become fairly settled by the beginning of the nineteenth century.⁵²

⁴⁶ 1 Keb. 650.

⁴⁷ Ibid., 675.

⁴⁸ 1 Stra. 144.

⁴⁹ 1 Leach Cr. L. 38.

⁵⁰ 1 Leach Cr. L. 274 (1783).

⁵¹ 2 Campb. 358 (1809).

⁵² In addition to the cases cited in the text, the following may be noted: *Rex vs. Thorp et al.*, 5 Mod. 221 (8 W. III, 1696), a

Conspiracies to accomplish a merely immoral purpose were scarcely noticed as such until the nineteenth century. The only eighteenth century case touching upon this subject is *Rex vs. Delaval et al.*⁵³ Lord Mansfield granted an information against the defendants for an executed conspiracy to apprentice a young girl eighteen years old to Sir Francis Delaval for purposes of prostitution, saying that "the general inspection and superintendence of the morals of the people belongs to this court [i. e., the Court of King's Bench], as *custos morum* of the nation . . . especially when the offense is mixed with confederacy and conspiracy, as in the present case." Here, as in the early cases concerned with conspiracies to cheat, the gist of the offense was the act done rather than the combination.

conspiracy to entice a young man under eighteen years of age to marry a woman of ill fame, contrary to his father's wishes. *Reg. vs. Tracy*, 6 Mod. 169, 170 (1704), to arrest the plaintiff and illegally to hold him without bail. *McDaniell's Case*, 1 Leach Cr. L. 444 (1759), and *Rex vs. Spragg*, 2 Burr. 993 (1760), were conspiracies to indict innocent persons of crimes. These would have been conspiracies at any period after the time of Edward I. In *Rex vs. Turnor*, 13 East 226 (1810), Lord Ellenborough decided that a combination to commit a civil trespass was not an indictable conspiracy. This decision, however, was not followed in the later cases. See Chapter V.

It should be observed that in all of these cases (with the possible exception of *Clifford vs. Brandon*) there were elements of illegality present in addition to the mere damage or oppression suffered by the complainant. Thus, as to *Rex vs. Thorp*, we may point out that the procurement of such marriages was looked upon as unlawful, independently of the element of conspiracy; *Reg. vs. Blacket & Robinson*, 7 Mod. 39 (1703); *In Re Seeles*, Cro. Car. 557 (1639). Moreover, the attorney for the prosecution argued that the conspiracy was mentioned only as matter of aggravation. In any event, no judgment was given in that case. In *Rex vs. Cope*, *Reg. vs. Tracy*, *McConnell's Case* and *Rex vs. Spragg*, the acts done would have amounted to civil wrongs if performed by single individuals. In *Elizabeth Robinson's Case* there was a scheme to defraud. Of *Rex vs. Eccles*, Lord Ellenborough said, in *Rex vs. Turnor*, that it "was considered as a conspiracy in restraint of trade, and so far a conspiracy to do an unlawful act affecting the public." The statement in *Clifford vs. Brandon* is *obiter dictum*; and it seems that in the case cited in the note thereto the element of combination was treated as matter of aggravation.

Thus it appears that the above cases present no exception to the principle soon to be announced that a conspiracy always contemplates the accomplishment of an unlawful purpose or the use of unlawful means.

⁵³ 1 W. Bl. 410, 440.

Conspiracies among merchants and others to raise the price of merchandise, and among workmen to enhance their wages, had found their way into the criminal courts during the period under consideration. We shall reserve our treatment of them, however, for a separate chapter. They may be classed under the general category of conspiracies to injure the public welfare.

By the end of the eighteenth century the definition of criminal conspiracy included combinations for a number of objects besides those known to the older law. The courts, moreover, had little hesitation in looking beyond the proximate to the ultimate purpose of the combination in order to determine its character. The principle that a conspiracy to do a lawful act to an unlawful end is illegal arose comparatively early. It first appears in the argument of counsel in *Rex vs. Sterling*.⁵⁴ It was pressed upon and approved by the court in *Rex vs. Edwards et al.*, though not strictly as part of the *ratio decidendi*. Its spirit is plainly evident in the conviction in *Elizabeth Robinson's Case*,⁵⁵ where there had been a conspiracy to marry under an assumed name for the purpose of obtaining title to one Richard Holland's estate. Upon the same principle the court held criminal a combination among the overseers of a parish to procure a marriage between paupers⁵⁶ for the purpose of throwing

⁵⁴ 1 Keb. 650.

⁵⁵ 1 Leach Cr. L. 38 (20 Geo. II, 1746).

⁵⁶ There are a number of these cases in the books. In some, acts of this character were considered as criminal although performed by a single individual. See *Rex vs. Watson et al.*, 1 Wils. 41 (1743)—several defendants, but no conspiracy; *Anon.*, Sayer 260 (1755); *Rex vs. Tarrant*, 4 Burr. 2106 (1767). In others the element of conspiracy was present. See *Rex vs. Edwards*; *Rex vs. Herbert et al.*, 2 Ld. Ken. 446 (1759); *Rex vs. Compton et al.*; *Rex vs. Tanner et al.*, 1 Esp. 304 (1795)—acquittal because prosecution failed to prove its case.

In *Rex vs. Fowler et al.*, East P. C. 461 (1788), the indictment was held not to lie; but this was because the purpose wrongfully to charge another parish had not been properly alleged.

Finally, in *Rex vs. Seward*, 3 M. & M. 557 (1834), it was held that such combinations are not conspiracies, because the purpose of charging another parish with the maintenance of a pauper is not illegal.

the expense of their maintenance upon another parish,⁵⁷ and a combination to bind a girl ostensibly as an apprentice in music but for the ultimate purpose of prostitution.⁵⁸ This principle became firmly established as a result of the holding in *Rex vs. Eccles et al.*,⁵⁹ that if a conspiracy to accomplish an illegal purpose is charged, the means to be employed need not appear in the indictment at all. In *Rex vs. De Berenger et al.*,⁶⁰ counsel for the defendants seemed to admit "that to conspire to do a lawful act to an unlawful end is a crime," and endeavored to prove that the purpose of the combination under discussion was not unlawful.

We turn now to a discussion of a few of the more general aspects of the conception of conspiracy as developed during the period under review.

Although it had been settled by the *Poulterers' Case*, *Rex vs. Sterling*, and *Rex vs. Best* that a conspiracy without more is a crime, the courts were rather loath to pursue this doctrine to its consequences. There are a number of statements by counsel and a few obiter dicta by the court that the conspiracy is the gist of the offense quite independently of the acts done. But the cases in which this principle was actually applied are rare. Court and counsel took that position only as a last resort. The general practice in conspiracy cases was to charge in the indictment that the prisoners had done certain acts per *conspirationem inter eos habitam*. In most instances the combination was treated as an element in the offense, or as matter of aggravation, emphasis being laid upon the acts done. Thus, in cases in which a conspiracy to cheat was noticed, the earlier holding, as we have seen, was that a cheat accompanied by a conspiracy is indictable. Lord Holt even went so far as to say that in *Rex vs. Sterling*⁶¹ "the gist of the offense was its influence upon the public, and not the conspiracy."

⁵⁷ *Rex vs. Edwards*, 8 Mod. 320 (1725). *Rex vs. Compton*, Cald. 246 (1782).

⁵⁸ *Rex vs. Delaval*, 1 W. Bl. 410, 439 (1762).

⁵⁹ Willes 583 (1783).

⁶⁰ 3 M. & S. 68 (1814).

⁶¹ *Reg. vs. Daniell*, 6 Mod. 100 (2 Anne, 1703).

Lord Mansfield thus describes the offense charged in *Rex vs. Rispal*:⁶² "The crime laid is an unlawful conspiracy. This, whether it be to charge a man with criminal acts, or such as only may affect his reputation, is fully sufficient. The several charges in the indictment are not to be considered as distinct and separate counts; but as one and the same united and continued offense, pursued through its different stages, and then it is clear that the whole will amount to an indictable offense: viz., the getting money out of a man by conspiracy to charge him with a false fact."

In some cases, also, where the acts complained of had been done by a combination of malefactors, the element of conspiracy was not noticed in the indictment. In others, although the indictment alleged that the acts had been done "per conspirationem," attention was fixed solely upon the acts performed, and the conspiracy received no further mention. And even in cases, such as *Reg. vs. Best*,⁶³ *Rex vs. Journeymen Tailors*,⁶⁴ etc., in which it was held that the conspiracy was the gist of the offense, the acts done were described in some detail in the indictment, and the above principle was urged in reply to an objection that the facts had not been properly alleged.⁶⁵

⁶² 1 W. Bl. 368 (2 Geo. III, 1760).

⁶³ 6 Mod. 137 (3 Anne, 1704).

⁶⁴ 8 Mod. 11 (8 Geo. I, 1721).

⁶⁵ Cases in which several persons joined in the wrong-doing, but the element of combination was disregarded: *Reg. vs. Parry et al.*, 2 Ld. Raym. 865 (2 Anne, 1703); *Rex vs. Watson et al.*, 1 Wilson 41 (1743).

Cases in which the conspiracy is mentioned, but apparently considered as a secondary element in the offense charged: *Rex vs. Thode*, 3 Keb. 111 (24 Car. II, 1672); *Rex vs. Parkehurst et al.*, 3 Keb. 799 (1677); *Rex vs. Ld. Grey*, 1 East P. C. 460 (1682); *Rex vs. Thorp*, 5 Mod. 221 (1696); *Rex vs. Grimes & Thompson*, 3 Mod. 220 (1688); *Reg. vs. Daniell*, 6 Mod. 100 (1703); *Reg. vs. Orbell*, 8 Mod. 42 (1703); *Rex vs. Edwards*, 8 Mod. 320 (1725); *Rex vs. Wheatley*, 1 W. Bl. 273 (1760); *Rex vs. Rispal*, 1 W. Bl. 368 (1760); *Rex vs. Delaval*, 1 W. Bl. 410, 440 (1762); *Rex vs. Hevey*, 1 Leach Cr. L. 232 (1782).

In the following cases the conspiracy seems to be the gist of the offense: *Reg. vs. Best et al.*, 6 Mod. 137 (1704); *Rex vs. Cope*, 1 Stra. 144 (1719); *Rex vs. Kinnersley & Moore*, 1 Stra. 193 (1719); *Rex vs. Journeymen Tailors*, 8 Mod. 11 (1721); *Elizabeth Robinson's Case*, 1 Leach Cr. L. 38 (1746); *Rex vs. Parsons*, 1 W. Bl. 392 (1762); *Rex vs. Compton, Cald.* 246 (1782).

The complete separation, in respect to their criminality, between the conspiracy and the act took place during the latter years of the reign of George III. In *Rex vs. Eccles et al.*,⁶⁶ the defendants had been convicted upon an indictment for a conspiracy to impoverish one H. Booth, a tailor, and to prevent him "by indirect means" from carrying on his trade. In arrest of judgment it was urged that the indictment should have described the acts committed, in order that the defendants might know the particular charges against them. Lord Mansfield said that "this is certainly not necessary, for the offense does not consist in doing the acts by which the mischief is effected, for they may be perfectly indifferent, but in conspiring with a view to effect the intended mischief by any means. The illegal combination is the gist of the offense." This principle was confirmed in *Rex vs. De Berenger*⁶⁷ and *Rex vs. Gill and Henry*.⁶⁸ In both cases the defendants had been convicted of a conspiracy to accomplish an unlawful purpose, and had urged in arrest of judgment that the means to be employed should have been set out. Both motions were overruled. Lord Ellenborough, in *Rex vs. De Berenger*, said that "the crime lies in the act of conspiracy and combination to effect that purpose, and would have been complete although it had not been pursued to its consequences, or the parties had not been able to carry it into effect." And Abbott, C. J., in *Rex vs. Gill*, stated that "the gist of the offense is the conspiracy. . . . The offense of conspiracy may be complete, although the particular means are not settled and resolved on at the time of the conspiracy."

Modern practice in reference to indictments for conspiracy is founded upon these cases; and it was by reason of the complete separation between the criminality of the conspiracy and that of the acts done that the broad scope given the former offense became possible.

There is little discussion in the early cases as to the

⁶⁶ 1 Leach Cr. L. 274 (24 Geo. III, 1783).

⁶⁷ 3 M. & S. 68 (54 Geo. III, 1814).

⁶⁸ 2 B. & A. 204 (59 Geo. III, 1818).

nature of the act of combining. It would appear that in civil actions of conspiracy the courts did not look beyond the mere fact that there had been a plurality of performers. During the reign of Henry VI we find it stated for the first time (in argument of counsel) that the plaintiff must show that there had been a previous "parlaunce" between the defendants as to how the thing should be done.⁶⁹ There is some evidence that for a time the mere consultation in respect to doing an unlawful act was sufficient. Thus, in *Rex vs. Sterling*⁷⁰ it is said that the defendants were found guilty of "assembling and consulting" to impoverish the fermors. So in *Reg. vs. Best*,⁷¹ Lord Holt says, "If two or three persons meet together and discourse and conspire how to accuse another falsely of an offense, it is itself an overt act, and is an offense indictable." In the same case, however, Powell states the modern rule: "If people meet together to consult or conspire, to make it criminal they ought to come to some resolution." He adds a proviso, however, apparently taken from *Bagg's Case*,⁷² that "if it appeared that he repented, it might alter the case." This exception, however, is not considered to be valid at the present time.

Almost contemporaneously with the doctrine that an unexecuted conspiracy is a crime, the courts adopted the principle that the acts done are to be treated as evidence of the concerted design. Thus, in *Rex vs. Sterling*,⁷³ Twisden, J., said, "If any of the particular facts, which are but evidence of the design charged, be found, it's sufficient to support the indictment." Lord Mansfield, in *Rex vs. Parsons et al.*,⁷⁴ instructed the jury "that there was no occa-

⁶⁹ Y. B. 35 Hen. VI, f. 14.

⁷⁰ 1 Lev. 125.

⁷¹ 11 Mod. 55.

⁷² Cause of disfranchisement of a burgess should be "an act or deed, and not a conation or an endeavor, which he may repent of before the execution of it and from whence no prejudice comes." The context indicates that the court considered this principle equally applicable to a conspiracy. 11 Co. 93 b, 98.

⁷³ 1 Keb. 650.

⁷⁴ W. Bl. 392 (3 Geo. III, 1763).

sion to prove the actual fact of conspiring, but that it might be collected from collateral circumstances." After the complete separation for purposes of indictment had taken place between the combination and the act, this principle served to keep them in their proper relation.

There is little discussion in the early books as to the theoretical basis of the criminality of conspiracy. The civil liability for conspiracy rested ultimately upon the damage suffered by the plaintiff. This view seems to have been adopted at first by the criminal courts. In the *Poulterers' Case* the reason given for punishing the unexecuted conspiracy was that such a policy tended to prevent crime and injury to innocent third parties. The modern view that the criminality of conspiracy lies in the intent, which is declared by the acts done, was first suggested in *Rex vs. Sterling*.⁷⁵ Except in these few passages, however, the judges do not attempt, until the nineteenth century, to justify the punishment of a bare agreement to commit an unlawful act. Conspiracy was considered as of an "odious nature." It was a "crime of blacker dye than barratry," comprehended under the denomination of *crimen falsi*, a conviction of which destroyed the competency of the party as a witness.⁷⁶ Hence it doubtless appeared to the courts that the reasons for punishing conspiracy were too obvious to require explanation. An interesting evidence of this attitude is seen in the principle that what is lawful for a single individual to do may be unlawful if done by a combination. This view, which had its origin in two *Star Chamber* decisions⁷⁷ of the time of Elizabeth, and was thought by some to have been laid down in *Rex vs. Sterling*, was received with some favor, and without discussion, during the seventeenth and eighteenth centuries.⁷⁸

⁷⁵ 1 Keb. 675.

⁷⁶ *Rex vs. Priddle*, 1 Leach Cr. L. 442 (1787).

⁷⁷ *Amerideth's Case*, Moore 562 (1600); *Lord Grey's Case*, Moore 788 (1607). See note 7, pp. 55, 56.

⁷⁸ In *Rex vs. Thorp*, 5 Mod. 221 (1696), counsel for the king argued that "that which is lawful for one man to do, may be made unlawful to be done by conspiracy," citing *Rex vs. Sterling*.

The punishment of those convicted of conspiracy has varied. In the civil courts the penalty was originally damages to the plaintiff, a fine to the king, and imprisonment. The criminal courts were more severe, and subjected conspirators to the "villanous judgment,"⁷⁹ which seems to have had its origin in the common law. The last "villanous judgment" of which there is a record was passed in the reign of Edward III.⁸⁰

As time went on, punishments for conspiracy became lighter. In the Star Chamber, barbarous penalties lingered longer than they did in the common-law courts. We accordingly find during the reign of James I cases in which conspirators were fined, whipped, pilloried, branded or

This idea was approved and applied in *Rex vs. Journeymen Tailors*, 8 Mod. 11 (1721). The court said: "A conspiracy of any kind is illegal, although the matter about which they conspired might have been lawful for them, or any of them, to do, if they had not conspired to do it, as appears in the case of the Tubwomen vs. the Brewers of London." The latter case is supposed to be the popular name of *Rex vs. Sterling*. In *Rex vs. Martham Bryan*, 2 Stra. 866 (1729), the court said obiter, in regard to *Reg. vs. Best*, "There the conspiracy was the crime; and an indictment will lie for that, though it be to do a lawful act." The same principle was approved, again obiter, by Lord Mansfield in *Rex vs. Eccles*, 1 Leach Cr. L. 274 (1783), and by Grose, J., in *Rex vs. Mawbey*, 6 T. R. 619 (1796). Although no authority was cited, both Lord Mansfield and Grose, J., evidently had in mind *Rex vs. Journeymen Tailors*.

At the present time a combination to accomplish a legal purpose by legal means is not a criminal conspiracy. Even today, however, a combination may be criminal although the acts contemplated would be merely unlawful, not indictable, if performed by a single individual. The same is true of a combination to employ lawful means as part of an unlawful scheme. See Chapter IV.

⁷⁹ The character of the villanous judgment appears from the following report (46 Lib. Ass. 11): "A man was attainted of conspiracy at the suit of the king upon indictment. Wherefore it was adjudged he lose his 'frank-law,' so that he should not henceforth be put upon juries, nor assizes, nor otherwise received in testimony of the truth, and that he shall not come within twelve leagues of the place where the king's court may be; and that his lands be seized into the king's hands, and his fields laid waste, and his wife and his children ousted and his trees uprooted, and his body taken and imprisoned. But if he be attainted at the suit of a [private] party, he shall have only simple judgment that the plaintiff recover his damages; and that he be imprisoned." See also 27 Lib. Ass. 59.

⁸⁰ Lord Mansfield so states in *Rex vs. Spragg*, 2 Burr. 993 (1796).

mutilated. In *Miller vs. Reignolds and Basset*⁸¹ all of these punishments were inflicted, and Reignolds, who was an attorney, was also degraded and "cast over the common pleas barre."

In the court of King's Bench, fine and imprisonment were the usual punishments, though corporal punishment was sometimes inflicted. *Rex vs. Brissac and Scott*⁸² is the last case recorded in which a conspirator was pilloried. The amount of the fine and imprisonment of course varied with the enormity of the offense. In *Rex vs. Priddle*⁸³ a conviction of conspiracy was held to have destroyed the competency of the prisoner as a witness.

By the end of the eighteenth century the law of conspiracy had assumed very nearly its present shape. Its growth, however, had been extremely unsystematic and dependent upon casual circumstances. The task of the courts in the nineteenth century, therefore, has been to develop and apply principles already suggested, to extract general doctrines from the confusion of the earlier cases, and to reduce the law to some degree of orderly and scientific arrangement. The manner in which this was attempted will be discussed in the following chapter.

⁸¹ Godb. 205.

⁸² 4 East 166 (1803).

⁸³ 1 Leach Cr. L. 442 (28 Geo. III, 1787).

CHAPTER IV.

THE CRIMINAL LAW OF CONSPIRACY IN THE NINETEENTH CENTURY.

It was laid down in *Rex vs. Gill* that since the combination is the gist of the offense of conspiracy, all that need be charged in an indictment is a combination for an illegal object. The overt acts performed serve merely as evidence to prove the conspiracy, and hence, in accordance with the general rule, are not required to be set out.

This principle is perfectly logical, but in practice it was found to work hardship upon persons accused of conspiracy. The connection between the combination and the acts to be done is too close to allow the prosecution to keep the accused in entire ignorance up to the time of the trial of what facts he will be called upon to disprove. Accordingly the practice arose of compelling prosecuting attorneys in conspiracy cases, upon the request of the defendants, to furnish bills of particulars giving more specific information in respect to the charges to be repelled. Just when this practice originated cannot be stated with certainty. In an anonymous case¹ decided in 1819, Abbott, C. J., refused to order a bill of particulars, saying that the gist of the indictment was the conspiracy, and that the application for such a bill was "unprecedented." But by 1836 these applications had come to be regarded with favor. Ordering a bill of particulars in proper cases was said to be a "highly beneficial practice."² In *Reg. vs. Ryecroft*³ (1852) and *Reg. vs. Stapylton*⁴ (1857) the defendants

¹ 1 Chitty 698.

² *Rex vs. Hamilton*, 7 Car. and P. 448, 454.

³ 6 Cox C. C. 76.

⁴ 8 Cox C. C. 69.

claimed and were supplied with bills of particulars as a "matter of right."

The custom of granting bills of particulars, however, cannot be construed as a modification of the doctrine laid down in *Rex vs. Gill*. It was simply an "expedient now employed in practice"⁶ to protect defendants against being put at a disadvantage by the vagueness of indictments which merely described in general terms a conspiracy to effect an evil purpose. The prisoner was not necessarily entitled to know all the details of the case against him, such as the specific acts he was charged with having done, and the times and places at which they were done.⁶ He could demand only such information as was reasonably sufficient to enable him fairly to defend himself in court; not a degree of particularity which would unduly hamper the prosecutor in the conduct of his case.⁷ A bill of particulars, in short, needed only to contain such information as would appear in a special count. It would be refused, therefore, if the indictment contained a special count, unless the defendant made affidavit that the special count did not give sufficient information regarding the overt acts to enable him to meet the accusation.⁸

In this way were solved the practical difficulties caused by the lack of specific information as to overt acts in indictments for conspiracy. But other problems springing from the generality of indictments drawn subsequently to *Rex vs. Gill* engaged the attention of the courts for almost forty years (1819-1859) after that famous decision. Guided by the principle there laid down that the conspiracy and its object are all that need be stated, the prosecuting attorney

⁶ *Reg. vs. Kenrick, D. & M.* 208 (1843).

⁶ *Rex vs. Hamilton et al.* (1836), 7 Car. & P. 448.

⁷ *Reg. vs. Stapylton* (1857), 8 Cox C. C. 69, 71.

⁸ See the above cases. Even if a bill of particulars were furnished, the prosecution was not necessarily confined to the matters therein stated. "If," said Littledale, in *Rex vs. Hamilton et al.*, "the prosecutors give a distinct and separate notice, that they mean to go into other evidence, and the defendants at the trial object to that, and rely upon the particulars, the judge at the trial will decide whether he will receive any evidence beyond the particulars."

would endeavor to tell in the indictment as little about his case as possible. The accused could then demand his bill of particulars. In many cases, however, he would prefer to take his chances at the trial, and then upon conviction he would move in arrest of judgment upon the ground that the indictment was defective in that it did not describe the offense with sufficient accuracy or fullness. The authority of *Rex vs. Gill* and *Rex vs. Eccles* was called in question a number of times, and the courts were compelled to scrutinize again and again the doctrines laid down in those decisions.⁹ The result was a complete triumph for the principles there announced. The courts consistently decided that the indictment for conspiracy need only allege a combination, and a purpose which the court can see is unlawful. Hence, in respect to conspiracies to cheat and defraud, it was repeatedly affirmed that the indictment need not specify the fraudulent methods and pretences to be employed, nor the names of the persons to be defrauded, nor the goods to be embezzled, and the like.¹⁰ These details were said to be merely matters of evidence to prove the conspiracy. In this manner the separation between the combination and the acts done was strongly emphasized.

The courts, however, took care that the unlawful purpose should be described with sufficient particularity to reveal the true nature of the concerted intention.¹¹ If there was a variance between the purpose as charged in the

⁹ See *Reg. vs. Kenrick, D. & M.* 208 (1843); *O'Connell vs. Reg.*, 11 Cl. & F. 155, 194-197 (1844); *Reg. vs. King et al.*, 7 Q. B. 780 (1845); *Reg. vs. Gompertz*, 9 Q. B. 824 (1846); *Sydsenf vs. Reg.*, 11 Q. B. 245 (1848).

¹⁰ *Anon.*, 1 Chitty 698 (1819); *Reg. vs. Kenrick et al.*, D. & M. 208 (1843); *Reg. vs. Blake & Tye*, 6 Q. B. 126 (1844); *Reg. vs. King et al.*, 7 Q. B. 780 (1845); *Sydsenf vs. Reg.*, 11 Q. B. 245 (1848); *Reg. vs. Whitehouse et al.*, 6 Cox C. C. 39 (1852).

¹¹ In *Rex vs. Fowle & Elliott*, 4 C. & P. 592 (1831), the indictment charged that the defendants "did confederate, combine and conspire to cheat and defraud the just and lawful creditors" of *Fowle*. Lord Tenderden, C. J., said: "This count appears to me to be much too general. It does not state what was intended to be done, or the persons to be defrauded. I should be very sorry to give effect to so general a count as this." However, he let the case proceed, and the defendants were acquitted. As to necessity for naming the persons to be defrauded, 4, see note 10, *supra*.

indictment and the purpose as proved by the evidence, the indictment was thrown out.¹² The same was true if the object of the combination as described in the indictment was not unlawful by necessary intendment.¹³ And although the overt acts need not be enumerated in the indictment, yet if they were alleged at all, and the averment of the particular intent was dependent upon them, they had to be proved as laid;¹⁴ otherwise the defendants would not be found guilty of the particular conspiracy charged. In *Reg. vs. Parker et al.*¹⁵ (1842) the ownership of goods of which the prosecutor was alleged to have been defrauded by a conspiracy was held necessary to be shown. In *Reg. vs. King et al.*¹⁶ it was even said that where the circumstances of the case indicated that the persons to be de-

¹² In *Rex vs. Thomas et al.*, 1 C. & P. 472 (1824), persons accused of a conspiracy to procure false witnesses in a certain action of ejectment were acquitted because the description of the court so imposed upon was uncertain, and also because there was a variance between the action mentioned in the indictment and that shown in the proof.

In *Rex vs. Biers*, 1 A. & E. 327 (1834), an indictment for conspiracy to charge the prosecutors with an offense under a certain act of Parliament was held to be vitiated by a misrecital of the act. See also *Reg. vs. Steel, Car. & M.* 337 (1841), a case of variance between the indictment and the evidence.

¹³ In *Rex vs. Jones et al.*, 4 B. & A. 345 (1832), judgment was arrested upon a conviction of conspiracy to embezzle the estate of Jones, a bankrupt, in order to cheat his creditors, because the indictment did not indicate beyond a doubt that Jones was legally a bankrupt. Denman, C. J., said (p. 349): "Here the indictment charges a conspiracy to remove and conceal the goods of Jones: but if the commission was bad, Jones had a right to remove them. If we were to hold such an indictment good, it would follow as a consequence, that a party who was entitled to recover goods in an action, if taken from him, might be declared a felon for removing the very same goods. There is nothing stated on the face of this indictment to constitute an offense." In *Reg. vs. Peck*, 9 A. & E. 686 (1839), he said, "Now obtaining goods without paying is, as Mr. Murphy argued, not necessarily a fraud: the words might apply to the obtaining goods to sell on commission."

See also *Rex vs. Richardson et al.*, 1 Mod. & R. 402. *Rex vs. Seward et al.*, 3 M. & N. 557 (1834): "When the charge is that it was intended to do the act by unlawful means, it must appear how those means are unlawful" (p. 561).

¹⁴ *Reg. vs. Dean et al.*, 4 Jur. 364 (1840).

¹⁵ 3 Ad. & E. N. S. 741. See also *Reg. vs. Bullock*, 1858.

¹⁶ 7 Q. B. 795, 806 (1845).

frauded were certain and definite individuals, they should have been named, or reasons given why they had not been named. In all these instances, however, the court simply exhibits the desire that the acts set out shall be sufficient to evidence and identify the guilty intent which is at the foundation of the offense of conspiracy.¹⁷

The principle that the criminality of the conspiracy is independent of the criminality of the overt acts following upon it has been logically applied, and has received some interesting illustrations in practice. Thus, in *Reg. vs. King et al.*¹⁸ (1845) it was said that if the first part of an indictment alleged a complete conspiracy, the overt acts set out would not reduce it to something not indictable even though they were in themselves innocent; their only object "being to give information of the particular facts by which it is proposed to make out the conspiracy." Again, in *Reg. vs. Button*¹⁹ (1848), the attorney for the defendants accused of conspiracy to commit larceny argued that the conspiracy, being a misdemeanor, merged in the larceny, which was a felony; also, that unless this objection were sustained, they might be twice punished for the same offense. The court overruled both defenses, saying that the two offenses are "different in the eye of the law," though Denman, C. J., thought that if the defendants should be prosecuted for larceny after a conviction of conspiracy, the court should apportion the sentence with reference to the former conviction. In *Reg. vs. Thompson et al.*²⁰ (1851) it was held that a conspiracy to violate an act of Parliament was not cured by the subsequent repeal of the act.²¹ The fact, also, that the acts done in pursuance of a conspiracy to

¹⁷ Upon a plea of *autrefois acquit*, however, the identity of the conspiracy must be a matter of evidence in ninety-nine cases out of a hundred. *Reg. vs. Blake & Tye*, 6 Q. B. 126 (1844).

¹⁸ 7 Q. B. 780.

¹⁹ 3 Cox C. C. 229.

²⁰ 16 Q. B. 832.

²¹ The fact, also, that one of the accused enjoys a statutory immunity from prosecution for the unlawful acts agreed upon will not affect the liability of either party for the conspiracy to do them. *Rex vs. Duguid*, 75 L. J. K. B. 470 (1906).

defraud would not result in barring the title of the party to be injured will not affect the liability of the prisoners.²² In *Reg. vs. Kohn*²³ (1864) the jury were instructed that a conspiracy entered into at Ramsgate between foreigners to scuttle a foreign ship upon the high seas was cognizable by the English courts, although they would have no jurisdiction to punish the acts done. The doctrine under discussion received its farthest extension in the recent case of *Reg. vs. Whitechurch*²⁴ (1890), in which the court held that a conspiracy between a woman and several others to commit an abortion upon her person was criminal, although she had been mistaken in believing herself pregnant.²⁵

It must be borne in mind, however, that this separation between the combination and the act done relates to the criminality of the two elements. Usually the conspiracy is closely bound up with the overt acts, because only by means of the latter can the combination be made out. The doctrines laid down in the cases respecting the nature of the evidence whereby conspiracy is to be proved are interesting and throw considerable light upon the conception of the offense entertained by the courts.

If in a prosecution for conspiracy the crown is able to produce a witness, not a co-conspirator,²⁶ who can testify directly to the fact of combination, the case is easy of proof. But, as Erle, J., well says,²⁷ "It does not happen once in

²² *Reg. vs. Carlisle & Brown*, 1 Dears. C. C. 337 (1854).

²³ 4 F. & F. 68.

²⁴ 24 Q. B. D. 420.

²⁵ The Act of 5 and 6 Victoria, C. 38 (1842), creates a more definite relation between the criminality of the conspiracy and that of the act done by providing that no justice of the peace or recorder of any borough shall at any session of the peace or at any adjournment thereof try any person or persons for certain offenses; among them (Sec. 16), "Unlawful combinations and conspiracies, except conspiracies or combinations to commit any offense which said justices or recorder respectively have or has jurisdiction to try when committed by one person."

²⁶ "So in the case of several persons indicted for burglary or conspiracy; one may be convicted on his own confession, which, though in terms involving the others is no legal evidence against them" (*obiter dictum*). *Robinson vs. Robinson & Lane*, 1 Sw. & Tr. 362, 365.

²⁷ *Reg. vs. Duffield*, 5 Cox C. C. 404, 434.

a thousand times that anybody comes before the jury to say, 'I was present at the time when these parties did conspire together, and when they agreed to carry out their unlawful purpose.'” Hence the courts have consistently held that the prosecution is not obliged to prove that the persons accused actually met and laid their heads together, and after a formal consultation came to an express agreement to do evil. On the contrary, if the facts as proved are such that the jury, “as reasonable men [can] see there was a common design, and they [i. e., the prisoners] were acting in concert to do what is wrong, that is evidence from which the jury may suppose that a conspiracy was actually formed.”²⁸ In other words, the overt acts may properly be looked to as evidence of the existence of a concerted intention. “If,” said Coleridge, J., to the jury in *Reg. vs. Murphy et al.*²⁹ (1837), “you find that these two persons pursued by their acts the same object, often by the same means, one performing one part of an act, and the other another part of the same act, so as to complete it, with a view to the attainment of the object which they are pursuing, you will be at liberty to draw the conclusion that they have been engaged in a conspiracy to effect the object.” To the same purpose was the instruction of Erle, J., in *Reg. vs. Duffield*³⁰ (1851): “If you see several men taking several steps, all tending towards one obvious purpose, and you see them through a continued portion of time, taking steps that lead to an end, why it is for you to say whether these persons had not combined together to bring about that end, which their conduct so obviously appears adapted to effectuate.”³¹ Thus, in *Reg. vs. Hall et al.*³² (1858), it was held that in a prosecution for a conspiracy among mer-

²⁸ *Reg. vs. Brown*, 7 Cox C. C. 442 (1858).

²⁹ 8 Car. & P. 297.

³⁰ 5 Cox C. C. 404, 434.

³¹ “Conspiracy is a matter of inference, deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them and which hardly ever are confined to one place.” Grose, J., (obiter) in *Rex vs. Brissac et al.*, 4 East 166, 169 (1803).

³² 1 F. & F. 33.

chants to dispose of their goods in contemplation of bankruptcy, with intent to defraud their creditors, their clandestine removal of the goods, prior to an absconding, would be evidence of such a conspiracy. So, too, letters passing between the accused may be offered to prove or disprove a conspiracy.³³

The overt acts are not merely evidence that there was a common design on the part of the accused. They may also be relied upon as a means of detecting the object of the combination. This principle, in conjunction with the principle that the criminality of the conspiracy lies in the concerted intention, supplies an intelligible basis for the doctrine that when once a conspiracy is shown to exist, the acts of each conspirator in furtherance of its object are evidence against each of the others; and this whether such acts were done before or after his entry into the combination, in his presence or in his absence. This doctrine was announced as early as the time of Elizabeth,³⁴ but it received its greatest development and application during the nineteenth century. According to its tenets, the prosecution must first prove that several persons had combined to effectuate a common design.³⁵ Evidence is also receivable at this preliminary stage of the case to show the general nature of the combination and its object.³⁶ Before all this can be made to affect any particular person accused of conspiracy, however, it must be clearly proved that he had become a participator in the combination so made out. But as soon as he is thus connected with the "general intent and

³³ *Reg. vs. Banks*, 12 Cox C. C. 393 (1873). *Rex vs. Whitehead*, 1 Car. & P. 67 (1824).

³⁴ "If many do conspire to execute treason against the prince in one manner, and some of them do execute it in another manner, yet their act, though different in the manner, is the act of all of them who conspire, by reason of the general malice of the intent." *Blunt's Case*, 1 How. St. Tr. 1410, 1412 (43 Eliz., 1066). See also *Hardy's Case*, 24 How. St. Tr. 438 (1794); *Horne Tooke's Case*, 25 How. St. Tr. 27 (1794); *Rex vs. Stone et al.*, 6 T. R. 527 (1796); *Rex vs. Hammond et al.*, 2 Esp. 719, 720 (1799); *Reg. vs. Salter et al.*, 5 Esp. 125 (1804).

³⁵ *Queen's Case*, 3 B. & B. 309 (1820).

³⁶ *Reg. vs. Lacey*, 3 Cox C. C. 517 (1848).

objects of the conspiracy,"³⁷ as soon as his privity with the combination and its object and his adoption of the acts already performed are shown, each conspirator becomes bound by the antecedent and the consequent acts of his co-conspirators. As Coleridge, J., well says, in *Reg. vs. Murphy*³⁸ (1837): "It is not necessary that it should be proved that these defendants met to concoct this scheme, nor is it necessary that they should have originated it. If a conspiracy be already formed, and a person joins it afterwards, he is equally guilty. . . . If you are satisfied that there was concert between them, I am bound to say, that being convinced of the conspiracy, it is not necessary that you should find both Mr. Murphy and Mr. Douglas doing each particular act, as, after the fact of the conspiracy is once established in your minds, whatever is either said or done by either of the defendants in pursuance of the common design, is, both in law and in common sense, to be considered as the act of both."³⁹

The reason for this doctrine is plain. Conspirators are not thereby subjected to punishment for offenses committed by their fellows. But since the crime lies in the concerted intention, and this is to be gathered from the acts done, such acts preceding the entry of a particular person into the combination are evidence to show the nature of the concert to which he becomes a party, and the subsequent acts of the other members indicate further the character of the common design in which all are presumed to be equally concerned. Therefore it follows that only acts done in furtherance of the common object are admissible in evidence against co-conspirators. A declaration by one conspirator after the completion of the transaction is not evidence against the others. In *Reg. vs. Blake and Tye*⁴⁰ (1844) the defendants had been accused of a conspiracy illegally to secure the entry of imports without the payment of

³⁷ *Reg. vs. Stenson*, 12 Cox C. C. 111 (1871).

³⁸ 8 Car. & P. 297, 310.

³⁹ See also *O'Keefe vs. Walsh et al.* (1903), 2 Ir. R. 681.

⁴⁰ 6 Q. B. 126, 139.

duties and so defraud the queen of her customs. It was held that Tye's daybook showing that the quantity of goods entered was much greater than had been declared to the customs officials should be received, but not a statement in his checkbook that a certain check afterwards drawn had been the means whereby he had transferred one half the profits of the scheme to Blake.

Several principles laid down in the cases follow logically from the above doctrines. In *Wright vs. Reg.*⁴¹ it was objected that an indictment for a conspiracy to obtain the "means and power" of securing certain East India stock belonging to a widow was defective in not charging the unlawful object with sufficient certainty. But Denman, C. J., thought that it should be sustained, as "the statement of the means used for effecting the object of the conspiracy is so interwoven with the charge of conspiracy as to show upon the face of these counts an unlawful conspiracy." Creswell, J., in *Reg. vs. Read*⁴² (1852), instructed a jury that "it is not necessary to prove that all the parties met together. If any evidence or circumstances had been adduced safely leading to the conviction that Read was a party, although absent, that would do." In *Reg. vs. Stenson et al.*⁴³ (1871), Kelly, C. B., said, "There can be no doubt that anything done at any time, even as late as the day before the trial, which shows that a person had been at a former time a party to a conspiracy, is admissible in evidence against him."

The fundamental principle that the act of combination is the gist of the offense of conspiracy received careful statement and development during the nineteenth century. Williams, J., in *Rex vs. Seward*⁴⁴ (1834), expressed a doubt "whether, without an overt act, the conspiracy itself amounts to any crime." No weight can be allowed to this remark, however, in the face of the numerous statements

⁴¹ 14 Q. B. 147, 168.

⁴² 6 Cox C. C. 134.

⁴³ 12 Cox C. C. 111, 117.

⁴⁴ 3 M. & M. 557, 563.

that a bare agreement to accomplish a forbidden purpose is indictable quite independently (except as explained above) of what is actually done in pursuance of it.⁴⁵ The modern rule is well stated by Brett, J. A., in *Rex vs. Aspinall*⁴⁶ (1876): "Now, first, the crime of conspiracy is completely committed, if it is committed at all, the moment two or more have agreed that they will do, at once or at some future time, certain things. It is not necessary in order to complete the offense, that any one thing should be done beyond the agreement. The conspirators may repent and stop, or may have no opportunity, or may be prevented, or may fail. Nevertheless the crime is complete; it was completed when they agreed."

A combination among the prisoners, however, must be proved. If unlawful acts are done without concert, the charge of conspiracy cannot be maintained. Nothing turns upon the word "conspiracy."⁴⁷ As Lord Campbell puts it in *Reg. vs. Hamp*⁴⁸ (1852), "Conspire is nothing, agreement is the thing." In *Reg. vs. Brown*⁴⁹ (1858) the same judge cautions the jury "against supposing that, if one or several have done what is improper, that will establish the charge against them," unless it is shown that there was "a joint design, a joint combination and conspiracy." In *Reg. vs. Barry*⁵⁰ (1865), Martin, B., said: "What I want is evidence of a conspiracy, which means a combination. In the books it is always called an agreement. In order to make out a conspiracy, there must be some concert. The parties must put their heads together to do it." In the

⁴⁵ *Rex vs. Kenrick, D. & M.* 208 (1843); *O'Connell vs. Reg.*, 11 Cl. & F. 155, 233; *Reg. vs. Hamp*, 6 Cox C. C. 167 (1852); *Reg. vs. Brown et al.*, 7 Cox C. C. 442 (1858); *Reg. vs. Barry*, 4 F. & F. 389 (1865); *Mulcahy vs. Reg., Ir. R.* 1 Com. Law 13 (1866-7); *Reg. vs. Banks*, 12 Cox C. C. 393 (1873); *Reg. vs. Bunn*, 12 Cox C. C. 316 (1872); *Reg. vs. Hilbert*, 13 Cox C. C. 82 (1875); *Reg. vs. Aspinall*, 2 Q. B. D. 48 (1876); *Reg. vs. Parnell et al.*, 14 Cox C. C. 508 (1881).

⁴⁶ 2 Q. B. D. 48, 58.

⁴⁷ *Reg. vs. Murphy*, 8 Car. & P. 297, 310 (1837).

⁴⁸ 6 Cox C. C. 167, 173.

⁴⁹ 7 Cox C. C. 442, 445.

⁵⁰ 4 F. & F. 389, 399.

great case of *Mulcahy vs. Reg.*⁵¹ (1868) Mr. Justice Willes advised the House of Lords that conspiracy consists, not in the mere intention, but in the agreement, to do the forbidden act.⁵² And in *Reg. vs. Banks*⁵³ (1873) the court instructed the jury that they must "be satisfied that an agreement actually existed between Leah and Elizabeth [Banks] to destroy the child when born. The jury must say whether the letter from Leah to Elizabeth, and the three previous letters from Elizabeth to Leah, indicated any such agreement. A mere suggestion from one to the other would not be sufficient."

It follows as a corollary from this proposition that if several are indicted jointly for conspiracy, the acquittal of all but one operates to free him also. The verdict of guilty rendered against a single person would be inconsistent with the charge of a concerted design. In *Reg. vs. Thompson et al.*⁵⁴ (1851) the jury found that Thompson had conspired with either Tillotson or Maddox, but they were unable to say which one. Cresswell, J., directed a verdict of not guilty against Tillotson and Maddox, and guilty against Thompson. Upon rule nisi for a new trial, Lord Campbell and a majority of the Court of Queen's Bench were of the opinion that the verdict could not stand. The indictment and the evidence tended to prove a conspiracy among the three; and hence if two were acquitted, the third could not have been guilty of the conspiracy set out in the indictment. Erle, J., dissented, believing that the charge was against each prisoner separately, wherefore a verdict that Thompson had conspired with some one (the jury did not know with whom) should have

⁵¹ L. R. 3 H. of L. 306, 316.

⁵² The same idea had been expressed in *Rex vs. Nield et al.*, 6 East 415 (1805), in these words: "And it is necessary to show a criminal object as well as a criminal intent. . . . But here the offense does not consist in intent merely. It is not enough that the agreement should be for the purpose of controlling; but it must be entered into for controlling, that is, for effecting that object." The language employed is inaccurate, but the meaning is clear enough.

⁵³ 12 Cox C. C. 393, 399.

⁵⁴ 16 Q. B. 832.

been rendered and sustained. The opinion of the majority in this case, however, is really not inconsistent with the general principle contended for by Erle. It was applicable to the form of the verdict as actually rendered and the evidence upon which it had been based. The court expressly said that if there had been a conspiracy among "five or six," and Tillotson and Maddox had been acquitted, the matter might have been different; in other words, there would have been room for a verdict that Thompson had conspired with a person unknown. *Reg. vs. Thompson* was cited and followed in *Reg. vs. Manning*⁵⁵ (1883). The indictment was against Manning and Haman for conspiracy to cheat and defraud. The jury found a verdict of guilty against Manning, but were unable to agree in regard to Haman, and hence were discharged from giving a verdict as to him. A new trial was ordered. Manning, J., said: "The rule appears to be this. In a charge for conspiracy in a case like this where there are two defendants, the issue is raised whether or not both the men are guilty, and if the jury are not satisfied as to the guilt of either, then both must be acquitted."⁵⁶

If, however, a verdict of guilty against a single defendant does not amount to a "legal impossibility" by reason of repugnancy apparent upon its face, the verdict will stand.⁵⁷ In *Rex vs. Cooke*⁵⁸ (1826) several were indicted for a conspiracy. Two pleaded not guilty, one never appeared, one pleaded in abatement. While the plea in abatement was pending, the trial of the two who had pleaded not guilty took place. One of these was acquitted, and the other was found guilty of conspiring with the defendant who had

⁵⁵ 12 Q. B. D. 241, 243.

⁵⁶ The farthest extension of the general principle under discussion is shown in *Rex vs. Plummer*, 71 L. J. N. S. 805 (1902). The three defendants had been indicted for obtaining money under false pretences, and for conspiracy to defraud. Plummer pleaded guilty to the charge of conspiracy, not guilty as to the rest. The other two defendants were afterwards acquitted upon the whole indictment. The court held that the conviction of Plummer must be quashed, since his plea was inconsistent with the verdict.

⁵⁷ *Reg. vs. Quinn*, 19 Cox C. C. 78 (1898).

⁵⁸ 5 B. & C. 538.

pleaded in abatement, and who had not yet been tried upon the merits of the case. The court refused even to stay judgment until the latter defendant could be tried. "We are not warranted in presuming that the other defendant in this case will be acquitted."⁵⁹ Littledale, J., however, remarked, "If the other defendant, R. S. Cooke, shall be hereafter acquitted, perhaps the judgment may be reversed." Very similar was *Reg. vs. Ahearne*⁶⁰ (1852), in which one of several defendants accused of conspiracy to murder was tried alone, found guilty, and sentenced to death. The court refused to stay judgment, although it was argued that the other prisoners might be acquitted, from which the innocence of Ahearne would follow by necessary intendment. Lefroy, C. J., said, "The reasons offered here by the prisoners' counsel may be good grounds for respiting execution, but certainly not for respiting or arresting judgment."

Conspiracy, then, is an agreement. The parties must unite in a common intention. But there must be something more. Mere concert is not in itself a crime, although the principles applied by the Court of Star Chamber and perhaps by the earlier Courts of King's Bench may have taught otherwise. The additional element of intention to effect a forbidden purpose is necessary to constitute the offense of conspiracy.⁶¹ Hence, a person accused of conspiracy may offer in evidence letters showing that although he had participated in the unlawful scheme, he had been the dupe of the other defendant, and so had been without privity in the concerted illegal intention to do wrong.⁶² It has been expressly laid down in reference to indictments for con-

⁵⁹ *Ibid.*, p. 545.

⁶⁰ 6 Cox C. C. 6.

⁶¹ *Reg. vs. Murray*, 1 Burns, J. (30th Ed.), 976 (1823). *Reg. vs. Parnell*, 14 Cox C. C. 508 (1881). *Reg. vs. Aspinall*, 2 Q. B. D. 48 (1870).

⁶² In *Rex vs. Pollman et al.*, 2 Campb. 229 (1809), Lord Ellenborough said: "You must prove that all the defendants were cognizant of the object of the conspiracy, and the mode stated in the indictment by which it was to be carried into effect. A contrary doctrine would be extremely dangerous."

spiracy to defraud the public by issuing a false prospectus describing shares of stock in a corporation,⁶³ and to defraud the public, the shareholders, and the customers of a bank by publishing false balance-sheets and other public representations regarding the affairs of the institution,⁶⁴ that the prosecution must prove, in addition to the performance of the acts charged, the existence of a common intention to defraud. If the defendants had had an honest belief in the truth of the statements so made, they could not be found guilty of conspiracy, although their conduct might not have been wholly free from elements of impropriety. So in *Reg. vs. Burch*⁶⁵ (1865), Smith, J., instructed the jury that they "must be satisfied, before they could convict, that there was a conspiracy on the part of both to make a false balance-sheet, and that they had an intention to defraud. The questions for consideration are three in number—first, whether there was a conspiracy or concert between them to make a balance-sheet; secondly, whether that balance-sheet was false and untrue; and thirdly, whether they conspired to defraud and deceive the shareholders. If they found all these questions in the affirmative, they would convict; if they found either in the negative, it would be their duty to acquit them."

It should be noted, in reference to this doctrine, that the "intent" is not necessarily identical with the particular intention in the minds of individual defendants. It extends to the consequences naturally following from the acts agreed upon; and if the object, adopted with full knowledge by the defendants, is illegal, the guilty intent to accomplish it must be ascribed to the conspirators, although their individual desires may have been proper enough. In *Reg. vs. Burch*⁶⁶ (1865), accordingly, Smith, J., told the jury that "it would be no answer on the part of the defendants to say that they had no personal advantage to obtain by mak-

⁶³ *Reg. vs. Brown*, 7 Cox C. C. 442 (1858).

⁶⁴ *Reg. vs. Burch*, 4 F. & F. 407 (1865). *Reg. vs. Gurney*, 11 Cox C. C. 414 (1869).

⁶⁵ 4 F. & F. 407, 422.

⁶⁶ 4 F. & F. 407, 422.

ing the false balance-sheet." In *Reg. vs. Hamp*⁶⁷ (1852) there was an indictment for a conspiracy to obstruct the course of justice. It appeared that Hamp, having falsely charged one Brown with having cheated him in a certain transaction, had been bound by recognizance to appear and prosecute. Afterwards, fearing lest he render himself liable for perjury, Hamp and others agreed with Brown's wife that if she would pay them £400 (which was £100 less than the amount of the recognizance under which Hamp had been placed), the latter would not appear or give evidence against Brown. It was argued that here was evidently no intent to obstruct justice, but only a desire to get Hamp out of trouble. But Lord Campbell said,⁶⁸ "If the necessary effect of the agreement was to defeat the ends of justice, that must be taken to be the object." In *Ex Parte Dalton*⁶⁹ (1890), a case in which there had been a conspiracy among certain inhabitants of Ireland to induce the Irish tenants of A. H. Smith-Barry not to pay their rent, the court said, "The intent to injure . . . is in the present case involved as matter of law in the object of the conspiracy."

We now approach the question as to what is the nature of the concerted intent constituting the gist of conspiracy. Or, in other words, since the intention is bound up in the object of the combination, What is the general character of the purpose which renders illegal a combination to effect it?

Here lies the crux of modern discussion upon the subject of conspiracy. Shortly stated, the problem before the courts is to frame a general definition of conspiracy broad enough to include all criminal combinations, and at the same time sufficiently definite and consistent to enable the judges to apply the law with precision in the manifold conspiracy cases which find their way into the courts.

This problem did not begin to exercise the courts until the nineteenth century. The growth of the law of con-

⁶⁷ 6 Cox C. C. 167.

⁶⁸ *Ibid.*, p. 172.

⁶⁹ 28 L. R. Ir. 36.

spiracy during the three preceding centuries had been guided by few general principles. The conception of the offense had been freely expanded to take in new combinations which the courts thought deserving of punishment, with little discussion or reference to any fixed standard.⁷⁰ Of course partial groupings of the cases had taken place. Thus, a number of more or less heterogeneous combinations were comprised under the general captions of conspiracy to injure the public,⁷¹ conspiracy to cheat, and the like. But no conscious attempt had been made to extract from the multiplicity of the cases any general principle which should serve as a reliable test to distinguish criminal

⁷⁰ It is noteworthy that until 1834 there had been only one important case in which the court held that the combination before it was not indictable as a conspiracy. The only other case was *Rex vs. Salter*, 2 Show. 443 (1685). This was an indictment "for that [the defendant] being an evil man, etc., and conspiring to aggrieve one Laud, pretended that he had broke his arm, and accordingly counterfeited the same, and upon that pretence refused to seek his living by any labor, and exhibited a complaint against him to the justices of the peace, etc." The indictment was quashed upon motion "as a matter not indictable." This case, however, is anomalous and possesses little significance.

But in *Rex vs. Turnor et al.*, 13 East 226 (1810), Lord Ellenborough arrested judgment upon a conviction of conspiracy to trespass upon a game preserve and snare, kill and destroy the hares therein. He said (p. 231): "But I should be sorry that the cases in conspiracy against individuals, which have gone far enough, should be pushed still farther; I should be sorry to have it doubted whether persons agreeing to go and sport upon another's ground, in other words, to commit a civil trespass, should be thereby in peril of an indictment for an offense which would subject them to infamous punishment." He seems, however, to recognize the principle making punishable combinations to achieve their objects "by some falsity" (p. 230).

This case was expressly overruled by Erle, J., in *Reg. vs. Rowlands*, 2 Den. C. C. R. 364, 388 (1851), upon the ground that the object which the conspirators had in view was also indictable, as well as actionable. But later cases have firmly established the principle that a combination to commit a tort is criminal. (See page 102.)

⁷¹ Conspiracies of this kind reported during the nineteenth century were: To pervert the course of justice by procuring false witnesses, *Rex vs. Thomas et al.*, 1 C. & P. 472 (1824); *Bushell vs. Barrett, Ry. & M.* 434 (1826). To secure a passport in the name of one person for use by another, *Rex vs. Brailsford et al.* (1901), 2 K. B. 730.

In addition, we may include combinations to defraud the public in various ways (see note 85, p. 103), and certain combinations among workmen (see Chapter V).

conspiracies from other combinations. Not until the nineteenth century had rooted out the instinctive antipathy of former times to all combinations, and had awakened the courts⁷² to the danger lurking in the extreme elasticity of the law of conspiracy, did the necessity for such a test make itself felt. In the meantime, however, the principle that the conspiracy is the crime had become firmly established, and the variety of the cases had made it necessary that the generalization possess wide limits.

The classic judicial definition of criminal conspiracy is a sentence uttered by Lord Denman in *Rex vs. Jones*⁷³ (1832). Several persons had been indicted for a conspiracy to conceal and embezzle the personal estate of Jones, a bankrupt, for the purpose of cheating his creditors. Upon conviction, the defendants made a motion in arrest of judgment, objecting that the indictment did not disclose beyond a doubt that Jones had been legally declared a bankrupt. Lord Denman said: "The indictment ought to charge a conspiracy, either to do an unlawful act, or a lawful act by unlawful means. Here the indictment charges a conspiracy to remove and conceal the goods of Jones; but if the commission was bad, Jones had a right to remove them. . . . There is nothing stated on the face of this indictment to constitute an offense."

Now it is clearly evident that the above antithesis was intended to limit the offense of conspiracy, not to define it. The court simply meant that the object of every criminal conspiracy must be unlawful, not necessarily that every combination for an unlawful object is criminal. Lord Denman himself said in a later case,⁷⁴ in answer to a citation by counsel of the antithesis, "The words 'at least' should accompany that." In *Rex vs. Seward*⁷⁵ (1834) he again relied upon the antithesis as a limitation: "No indictment for a conspiracy can be maintained unless it charge

⁷² Observe the language of Lord Ellenborough in *Rex vs. Turnor et al.*, 13 East 226 (note 70, p. 98).

⁷³ 4 B. & A. 345, 349.

⁷⁴ *Reg. vs. King*, 7 Q. B. 782, 788 (1845).

⁷⁵ 3 M. & M. 557, 561.

that the defendants conspired to do an unlawful act, or to do a lawful act by unlawful means; and I see neither of these requisites here." And in *Reg. vs. Peck*⁷⁶ (1839) the same judge said, "I do not think the antithesis very correct." But the part which it played in the later decisions presents another very striking illustration of the accidental, unsystematic method by which the law of conspiracy has developed. In *Reg. vs. Vincent et al.*⁷⁷ (1839) Alderson, B., employed Lord Denman's antithesis for the first time as a definition, saying that conspiracy "is a crime which consists either in a combination and agreement by persons to do some illegal act, or a combination and agreement to effect a legal purpose by illegal means." In spite of its author's dissatisfaction with it, this antithesis has been treated as a definition ever since. As such it serves as the very foundation of the modern law of conspiracy. It has been cited, always with approval and without examination or criticism, in a long line of nineteenth and twentieth century cases,⁷⁸ until its terms have become firmly embedded in the structure of the national jurisprudence.

A considerable portion of the progress made by the law of conspiracy during the past seventy-five years has taken the direction of simple deduction from Lord Denman's antithesis. The problem has been to determine the meaning of the words "unlawful act" and "unlawful means." The manner of its solution during the nineteenth century is largely responsible for the broad scope characteristic of the modern conception of criminal conspiracy. The earlier

⁷⁶ 9 A. & E. 686, 690.

⁷⁷ 9 C. & P. 91, 109.

⁷⁸ See *Rex vs. Seward et al.*, 3 M. & M. 557 (1834)—by Lord Denman; *Reg. vs. Vincent*, 9 C. & P. 91 (1839); *O'Connell vs. Reg.*, 11 Cl. & F. 155, 233 (1844); *Reg. vs. Carlisle & Brown*, 1 Dears. C. C. 337 (1854); *Reg. vs. Brown et al.*, 7 Cox C. C. 442 (1858); *Reg. vs. Howell et al.*, 4 F. & F. 160 (1864); *Mulcahy vs. Reg.*, Ir. Rep. 1 Com. Law, 13, 31 (1866-7); *Reg. vs. Bunn*, 12 Cox C. C. 316 (1872); *Reg. vs. Aspinall*, 2 Q. B. D. 48 (1876); *Reg. vs. Orman & Barber*, 14 Cox C. C. 381 (1880); *Reg. vs. Parnell et al.*, 14 Cox C. C. 508 (1881); *Ex Parte Dalton*, 28 L. R. Ir. 36 (1890); *Quinn vs. Leathem*, 70 L. J. R. C. 76 (1901); *Rex vs. Brailsford* (1905), 2 K. B. 730.

cases had settled little more than that concerted enterprises directly harmful to the public, and schemes of blackmail by false charges, are punishable as conspiracies.

It is obvious that an indictable offense is an "unlawful act." Combinations to commit crimes, of statutory or of common-law origin, therefore, clearly fall within Lord Denman's definition. This principle was laid down expressly by Erle, J., in *Reg. vs. Rowlands*⁷⁹ (1851), overruling *Rex vs. Turnor*: "An agreement to commit an indictable offense undoubtedly amounts to a conspiracy." A large number of the conspiracy cases decided during the nineteenth century were of this character, among them numerous conspiracies to cheat, wherein the means employed would have rendered an individual guilty of the crime of obtaining money under false pretences.⁸⁰

⁷⁹ 2 Den. C. C. R. 364, 388.

⁸⁰ The following are cases in which the objects of the combinations were themselves indictable offenses. To cheat the king by false vouchers, *Rex vs. Brissac et al.*, 4 East 166 (1803). To hold an unlawful, seditious and disorderly meeting, *Rex vs. Hunt et al.*, 3 B. & A. 566 (1820). To obtain enhanced wages, in violation of St. 39 and 40 Geo. III, *Rex vs. Ridgeway*, 5 B. & A. 527 (1822). To carry away a young lady under sixteen years of age from the custody of her parents and guardians and marry her to one of the conspirators, contrary to St. 3 Hen. VII, C. 2, *Rex vs. Wakefield*, 2 Lew. 1 (1827). To poison a man, *Maudsley's Case*, 2 Lew. 51 (1830). To conceal and embezzle the goods of a bankrupt, and so to cheat his creditors, *Rex vs. Jones et al.*, 4 B. & A. 345 (1832). To raise an insurrection and obstruct the laws, *Reg. vs. Shellard*, 9 C. & P. 277 (1840). To hold an unlawful assembly and create disaffection, *Reg. vs. Vincent et al.*, 9 C. & P. 91 (1839). To cheat and defraud by false pretences, *Reg. vs. Parker et al.*, 3 Ad. & E. N. S. 741 (1842). To cheat of money by false pretences, *Reg. vs. Kenrick, D. & M.* 208 (1843). To create disaffection, hatred and sedition, etc., *O'Connell et al. vs. Reg.*, 11 Cl. & F. 155 (1844). To forge a post-office money order, and thus to defraud the queen and others, *Reg. vs. Brittain & Shackell*, 3 Cox C. C. 76 (1848). To use a dyer's materials wrongfully to dye goods for other persons (under circumstances such as to make the conspirators liable for larceny or embezzlement of the materials), *Reg. vs. Button et al.*, 3 Cox C. C. 229 (1848). To violate Act 6 Geo. IV, C. 129 (see Chapter V), *Reg. vs. Duffield et al.*, 5 Cox C. C. 404 (1851); *Reg. vs. Rowlands et al.*, 5 Cox C. C. 436 (1851). To commit murder, *Reg. vs. Ahearne*, 6 Cox C. C. 6 (1852); *Reg. vs. Bernard*, 1 F. & F. 240 (1858). To destroy a ship with intent to prejudice the underwriters (a felony by Stat. 24-5 Vict., C. 79), *Reg. vs. Kohn*, 4 F. & F. 68 (1864). To defraud a benefit society of its funds, *Reg. vs. Knowlden et*

But the courts made the term "unlawful" as used in Lord Denman's definition include many acts which would not have been criminal if performed by a single person. Thus, they held that a combination to induce a girl to become a common prostitute was an indictable conspiracy, as being a combination "to bring about an unlawful thing."⁸¹ Also, it was specifically decided in several cases, and finally generalized in *Reg. vs. Duffield*⁸² (1851) and in later cases down to *Ex Parte Dalton*⁸³ (1890), that an agreement to do (or threaten to do) an act which would amount only to a private wrong if performed by a single person is a criminal conspiracy,⁸⁴ such object being "illegal" within the meaning of the definition. Again, a great variety of combinations to cheat and defraud—by far the largest class of criminal combinations at the present

al., 9 Cox C. C. 483 (1864). To liberate from gaol a prisoner charged with treason (a felony), *Reg. vs. Desmond et al.*, 11 Cox C. C. 146 (1868). To commit larceny, *Reg. vs. Taylor and Smith*, 25 L. T. N. S. 75 (1871). To kill an infant after it should be born, *Reg. vs. Banks*, 12 Cox C. C. 393 (1873). To commit abortion, *Reg. vs. Whitechurch*, 24 Q. B. D. 420 (1890). To defraud by false pretences, *Rex vs. Plummer*, 71 L. J. N. S. 805 (1902). To take a child out of the custody of its guardians (a felony by St. 24 and 25 Vict., C. 100, Sec. 56), *Rex vs. Duguid*, 75 L. J. K. B. 470 (1906).

Within this class of conspiracies should be included combinations among workmen to do acts forbidden by statute. See Chapter V.

⁸¹ *Reg. vs. Howell et al.*, 4 F. & F. 160 (1864). See also *Reg. vs. Mears, T. & M. Cr. C.* 414 (1851).

⁸² 5 Cox C. C. 404.

⁸³ 28 L. R. Ir. 36.

⁸⁴ In the following cases the acts contemplated by the conspirators would have amounted to legal injuries if performed by single individuals. To poison cattle with arsenic, *Rex vs. King et al.*, 2 Chitty 217 (1820). To extort money by a false charge of forgery and felony, *Rex vs. Ford & Aldridge*, 1 N. & M. 776 (1833). To extort goods by a threat to imprison, *Bloomfield vs. Blake et al.*, 6 C. & P. 75 (1833). To charge a person with a crime, *Rex vs. Biers*, 1 A. & E. 327 (1834). To extort money by a threat to charge with a crime, *Reg. vs. Yates et al.*, 6 Cox C. C. 441 (1853). To impoverish Irish landlords by inducing and compelling tenants not to pay rent, *Reg. vs. Parnell et al.*, 14 Cox C. C. 508 (1881); *Ex Parte Dalton*, 28 L. R. Ir. 36 (1890).

The principle that a conspiracy to commit a legal injury is indictable was stated generally in *Reg. vs. Parnell (supra)*, *Kearney vs. Lloyd*, 26 L. R. Ir. 268, *Quinn vs. Leathem*, 70 L. J. R. C. 76 (1901).

time—were brought within the conception of conspiracy, although the deception practised was not of such a character as would render a single person guilty of the crime of obtaining money under false pretences.⁸⁵ All these were

⁸⁵ The following combinations may be embraced within the general category of conspiracies to cheat and defraud. To obtain goods on credit with intent to defraud the merchant of the price, *Rex vs. Roberts et al.*, 1 Campb. 399 (1808). To cheat and defraud by selling an unsound horse, *Rex vs. Pywell et al.*, 1 Starke 402 (1816). To defraud of goods, *Anon.*, 1 Chitty 698 (1819). To defraud by misrepresenting value of certain lands and properties and thus inducing the prosecutor to loan large sums of money, *Rex vs. Whitehead*, 1 Car. & P. 67 (1824). To cheat and defraud (but indictment said to be "too general"), *Rex vs. Fowle & Elliott*, 4 C. & P. 592 (1831). To buy goods with intent not to pay for them, etc., *Reg. vs. Peck*, 9 A. & E. 686 (1839). To defraud of goods by false pretence that the defendant was a certain merchant named Grantham, *Reg. vs. Steel*, Car. & M. 337 (1841). To cheat and defraud of the fruits of a verdict (but charge said to be "too general"), *Reg. vs. Richardson et al.*, 1 Moo. & R. 402 (1841). To defraud the queen by procuring the illegal entry of dutiable imports without payment of the duty, *Reg. vs. Blake & Tye*, 6 Q. B. 126 (1844). To cheat and defraud by false pretences in a sale of two horses and a mare, *Reg. vs. Ward*, 1 Cox C. C. (1844). "To cheat and defraud of goods and chattels," *Sydserv vs. Reg.*, 11 Q. B. 245 (1848). To defraud of money by inducing a person by false pretences to accept certain bills of exchange, *Reg. vs. Gompertz et al.*, 9 Q. B. 824 (1846). To cheat and defraud by securing goods on credit and selling them to one of the defendants upon execution after a collusive action, *Reg. vs. King et al.*, 7 Q. B. 780 (1845). To cause foreign goods to be removed unlawfully from a bonded warehouse, with intent to defraud the queen of duties payable thereon, *Reg. vs. Thompson et al.*, 16 Q. B. 832 (1851). To obtain goods from tradesmen with intent not to pay for them, *Reg. vs. Whitehouse et al.*, 6 Cox C. C. 39 (1852); *Reg. vs. Ryecroft et al.*, 6 Cox C. C. 76 (1852). To cheat and defraud of leasehold tenements and messuages, *Reg. vs. Whitehouse et al.*, 6 Cox C. C. 129 (1852). To cheat and defraud by false representations as to the soundness of horses, *Reg. vs. Carlisle & Brown*, 1 Dears. C. C. 337 (1854). To defraud of money by exchanging cancelled notes for good money, *Reg. vs. Bullock & Clarke*, Dears. C. C. 653 (1856). Among tradesmen, to dispose of their goods in contemplation of bankruptcy, with intent to defraud creditors, *Reg. vs. Hall et al.*, 1 F. & F. 33 (1858). To cheat and defraud by false representations as to the solvency or trade of another person, whereby the prosecutor was induced to enter into partnership with him and suffered loss, *Reg. vs. Timothy et al.*, 1 F. & F. 39 (1858). Among directors of a corporation, by false representations in a balance-sheet to defraud shareholders and the public, *Reg. vs. Brown et al.*, 7 Cox C. C. 442 (1858). To defraud a railway company by obtaining and selling non-transferable excursion tickets to other persons for use by them, *Reg. vs. Absolon & Clarke*, 1 F. & F. 498 (1859). To

held to be combinations for "illegal" purposes. A good statement of the modern law upon the subject is found in *Reg. vs. Aspinall*⁸⁰ (1876). Erle, J., said: "It is not, of course, every agreement which is a criminal conspiracy. It is difficult, perhaps, to enumerate an exhaustive or a complete definition; but agreements may be described which are undoubtedly criminal. An agreement to accomplish an end forbidden by law, though by means which would be harmless if used to accomplish an unforbidden end, is a criminal conspiracy. An agreement to accomplish, by means which are if done by themselves forbidden by law, an end which is harmless if accomplished by unforbidden means, is a criminal conspiracy. An agreement made with a fraudulent or wicked mind to do that which, if done, would give to the prosecutor a right of suit founded on fraud, or on violence exercised on or towards him, is a

cheat by procuring a person to bet upon a proposition which had been "fixed" beforehand (guilt of offenders was not relieved by the fact that the prosecutor had intended in the same manner to cheat one of the defendants), *Reg. vs. Hudson et al.*, *Bell C. C.* 263 (1860). To defraud of money by false pretences, *Latham et al. vs. Reg.*, 5 B. & S. 635 (1864). To defraud an insurance company by sending in false lists of goods destroyed in a fire, *Reg. vs. Barry et al.*, 4 F. & F. 389 (1865). To defraud shareholders in a corporation by publishing a false balance-sheet, *Reg. vs. Burch et al.*, 4 F. & F. 407 (1865). To cheat the public by circulating a false prospectus leading to the sale of worthless shares of stock, *Reg. vs. Gurney et al.*, 11 Cox C. C. 414 (1869). Between a partner in a firm and a third person to defraud the other partner of the share of assets to which he was entitled upon a dissolution of the partnership, *Reg. vs. Warburton*, 11 Cox C. C. 584 (1870). To defraud certain booksellers by circulating forged testimonials respecting a certain book which they were thereby induced to buy, *Reg. vs. Stenson et al.*, 12 Cox C. C. 111 (1871). To defraud by procuring by false pretences the listing of certain stock by the stock exchange, *Reg. vs. Aspinall et al.*, 2 Q. B. D. 48 (1876). To defraud tradesmen of certain jewelry by obtaining it on credit without intention to pay for it, *Reg. vs. Orman & Barber*, 14 Cox C. C. 381 (1880). To sue for and collect a debt which had been already paid, *Reg. vs. Taylor & Boynes*, 15 Cox C. C. 265 (1883). To cheat and defraud, *Reg. vs. Manning*, 12 Q. B. D. 241 (1883). To cheat the public by inducing persons to buy stock given a fictitious value by manipulation, *Scott vs. Brown*, 61 L. J. Q. B. 738 (1892). To cheat and defraud of goods, *Reg. vs. De Kromme*, 17 Cox C. C. 492 (1892). To cheat and defraud a railway company by abstracting and selling return half-tickets, *Reg. vs. Quinn et al.*, 19 Cox C. C. 78 (1898).

⁸⁰ 2 Q. B. D. 48.

criminal conspiracy; see *Reg. vs. Warburton*. There may be and probably are others."

There seems to be no doubt at the present time that the above described combinations are criminal conspiracies. Now the question arises, Are there any cases in which a combination, whose object, whether proximate or remote, was not "illegal" in the senses above indicated, has been authoritatively declared to be criminal?

This question has been raised most frequently in connection with combinations in furtherance of industrial disputes. These will be discussed in detail in the following chapter. It may be stated generally, however, that during the nineteenth century every combination held to be a criminal conspiracy had for its object, either proximate or remote, something which was clearly illegal. In a few cases it is doubtful whether the acts contemplated were unlawful in the sense of being criminal or even tortious. Thus, in *Rex vs. Serjeant*⁸⁷ (1826) the defendants were convicted of conspiracy by false oath and false pretences to cause a marriage between an infant and a prostitute, with the intent thereby to injure the infant, deprive him of his property, and bring him into public scandal. Also, in *Levi vs. Levi*⁸⁸ (1833), Gurney, B., said obiter that a combination among brokers to refrain from bidding against one another at an auction sale, and afterwards to share the profits arising from the low selling prices thereby induced, would be an indictable conspiracy. Again, in *Rex vs. Mott*⁸⁹ (1827), Abbott, C. J., instructed the jury that a combination to fabricate shares in a corporation in addition to the number authorized in the charter was a conspiracy, although there had been a defect in the formation of the company.⁹⁰ There are other cases

⁸⁷ 1 R. & M. 352.

⁸⁸ 6 Car. & P. 239.

⁸⁹ 2 Car. & P. 521.

⁹⁰ Observe the difference between *Rex vs. Mott* and *Rex vs. Stratton et al.*, note to *Buck vs. Buck*, 1 Campb. 549 (1808), where in the defendants had been indicted for a conspiracy to deprive a man of his office as secretary in an unincorporated company with transferable shares. Lord Ellenborough held that the indictment could not be maintained, saying: "This society was certainly il-

of the same general character.⁹¹ But in all of them either the object aimed at or the means employed was certainly "illegal" in the sense of deceitful, fraudulent, against public policy, or the like. Often the acts done might be cognizable by the courts in proper cases, though not giving rise to an action under the particular circumstances shown.

Understanding its terms in a wide sense, therefore, we may accept Lord Denman's antithesis as a comprehensive definition of the offense of conspiracy in modern English law.

There is some apparent confusion and contradiction in the nineteenth century cases as to the status of combinations to effect an admittedly illegal purpose by the use of means not illegal *per se*.

As we have seen, it was declared during the eighteenth century that such combinations were indictable, no matter whether the means to be employed were lawful or not. There are also cases in the nineteenth century in which this principle was affirmed. In *Rex vs. Hollingberry*⁹² (1825) the prisoners were convicted of a conspiracy to extort money from the prosecutor by indicting him for keeping a

legal. Therefore to deprive an individual of an office in it, cannot be treated as an injury. When the prosecutor was secretary to the Company, instead of having an interest which the law would protect, he was guilty of a crime." Such companies had been forbidden by St. 6 Geo. I, C. 18, and branded as common nuisances.

⁹¹ The following cases should be noted in addition to those set out in the text. To defraud by holding a mock auction and colusively bidding up inferior goods, *Rex vs. Lewis*, 11 Cox C. C. 404 (1834). To prevent the collection of a church rate by gathering riotous assemblies before the broker's house and directing public hatred against him, *Rex vs. Murphy et al.*, 8 Car. & P. 297 (1837). To disquiet a person in possession of leasehold estates by molesting the tenants, etc., *Rex vs. Cooke*, 5 B. & C. 538 (1826). To defraud a legatee of money under a will by making a false oath that a certain third person was the testator's grandson, *Reg. vs. Dean et al.*, 4 Jur. 364 (1840). To defraud a widow of East India stock by fraudulently obtaining letters of administration upon the estate of her husband, etc., *Wright vs. Reg.*, 14 Q. B. 147 (1849). To extort money by threat to charge a person with a crime of which he was really guilty, *Rex vs. Hollingberry*, 6 D. & R. 345 (1825); *Reg. vs. Yates et al.*, 6 Cox C. C. 441 (1853); *Reg. vs. Jacobs et al.*, 1 Cox C. C. 173 (1845).

⁹² 6 D. & R. 345, 349.

gaming house, although the jury found specifically that the charge was true. Abbott held that this latter circumstance was immaterial, "because the question was whether they exhibited them [the charges] illegally, with an illegal intent and for an illegal purpose, which the jury, after full consideration, have found that they did." This ruling was cited and confirmed in *Reg. vs. Jacobs*⁹³ (1845). Likewise, in *Reg. vs. Hall*⁹⁴ (1858) a conspiracy among traders to dispose of their goods in contemplation of bankruptcy, with intent thereby to defraud their creditors, was held to be indictable, and in *Reg. vs. Taylor and Boynes*⁹⁵ (1883) it was decided that a combination to sue for and collect a sum of money to which the defendants knew they were not entitled was a criminal conspiracy. Lord Coleridge said "that a legal proceeding perfectly regular might yet be fraudulent, or a step taken or means used in the prosecution of a fraudulent scheme." This direction was approved by the entire court upon motion for a new trial. As Mathew, J., put it, "the broad question was this—whether these two defendants laid their heads together to obtain a judgment for £30, very little of which, as they knew, was due."

In addition to these specific cases, the books contain a number of general statements confirming the doctrine that the legality vel non of the means employed in execution of the conspiracy is immaterial. In *Reg. vs. King*⁹⁶ (1845) Lord Denman said: "It was argued that the overt acts limit the allegation in the first part of the indictment, and that even if that showed a criminal conspiracy, the statements afterward reduce it to something not indictable. But I think that result does not follow, even if the overt acts alleged are innocent; the only object of those being to give information of the particular facts by which it is proposed to make out the conspiracy, and the mode in which the prosecutor asserts that it was carried into effect." The

⁹³ 1 Cox C. C. 173.

⁹⁴ 1 F. & F. 33.

⁹⁵ 15 Cox C. C. 265.

⁹⁶ 7 Q. B. 780.

same view appears in the opinion of Brett, J., in *Reg. vs. Aspinall*⁹⁷ (1876). In elaborating Lord Denman's definition of conspiracy, he says in terms, "An agreement to accomplish an end forbidden by law, though by means which would be harmless if used to accomplish an unforbidden end, is a criminal conspiracy."

Some apparent doubt was cast upon this doctrine by the cases of *Rex vs. Seward*⁹⁸ (1834) and *Reg. vs. Taylor and Smith*⁹⁹ (1871). In the *Seward* case there had been a conspiracy among several parish officers to procure a marriage (by a promise to secure the marriage license, pay the expenses of the marriage, and give the husband £3) between a male pauper and a female pauper with child of a bastard, for the purpose of throwing the burden of the woman's maintenance upon the husband's parish. The Court of King's Bench unanimously held that this combination was not indictable. The majority of the judges based their decision upon the ground that the purpose of the transaction (i. e., to charge the other parish) was not illegal, provided no unlawful means were used. Hence, the question as to a conspiracy to accomplish a wrongful purpose by innocent means was not really before the court. But in answer to an argument by the prosecution that conspiring to do a lawful act for the purpose of injuring another is indictable, Littledale, J., said (p. 560), "If parties conspire to do an unlawful act, or a lawful act by unlawful means, this is a conspiracy, for which they may be indicted; but that is not so where the parties conspire to do a lawful act, for the purpose of injuring another." The prosecution then urged that the gist of the offense was not "a conspiracy to procure a marriage between paupers, but for conspiring unlawfully to remove a burden from their own parish, and unlawfully to charge the other parish;" that this was an indictable offense, wherefore the means employed need not be stated. But Denman, C. J., answered, "But when overt acts are stated, some of them must be unlawful."

⁹⁷ 2 Q. B. D. 48, 58.

⁹⁸ 3 M. & M. 557.

⁹⁹ 25 L. T. N. S. 75.

The idea apparently in Lord Denman's mind seems to have been clearly expressed in *Reg. vs. Taylor and Smith*.¹⁰⁰ Here was an indictment for conspiracy to commit larceny. The evidence offered at the trial showed "that the prisoners and another were seated on a door step; that when a well-dressed man or woman went into the crowd, one of the prisoners nudged the others, whereupon two of them rose and followed that person. In the case of a man, they lifted his coat-tail, as if to ascertain if there was anything in his pocket; but they did not attempt to insert a hand in the pocket. In the case of a woman, they went and stood by her side; the hand of one of the prisoners was seen to be against her gown, but it was not seen as attempted to be thrust into her pocket, nor was any complaint made by these persons of any such attempt." Cox, Serjeant, held that there was not sufficient evidence of conspiracy or attempt: "It appears to me to be impossible to say that the doing of an act not illegal is evidence of a conspiracy to do an illegal act, there being no other evidence of conspiracy than the act so done." Accordingly, a verdict of not guilty was returned under the instruction of the court.

It would seem that the doctrine that a combination to effect an admittedly illegal purpose by means not illegal per se is an indictable conspiracy is sound upon both reason and authority. It is limited, however, by the Taylor Case, to this extent: a conspiracy to accomplish an illegal purpose cannot be proved by a series of legal acts. This limitation goes not to the essence of the offense, but to the evidence by which it is to be made out. An indictment, consequently, which charges a conspiracy to effectuate an unlawful purpose would not be vitiated by the fact that the overt acts set out are not illegal per se. This follows from the principle laid down in *Rex vs. Gill* that the means to be employed are no part of the charge of conspiracy, the latter resting wholly upon the combination for an unlawful object. The overt acts alleged might be rejected as surplusage and

¹⁰⁰ 25 L. T. N. S. 75 (1871).

leave the charge itself untouched. Of course, if the acts described showed conclusively that the intent imputed to the conspirators had not in reality been entertained by them, the indictment would fail; but the same practice would be followed in respect to indictments for any other offense. Ordinarily, an indictment charging a conspiracy to attain an unlawful object by lawful means should be sustained upon demurrer, but at the trial the prosecutor should be required to adduce other evidence of the unlawful purpose than the doing of perfectly legal acts. The point becomes clear when we compare *Rex vs. Taylor and Smith* with *Rex vs. Taylor and Boynes*. In the former case there was no evidence of the illegal combination beyond the acts mentioned above. In the latter there was the additional circumstance that the debt sued for had already been paid to the prisoners, and hence their subsequent resort to an action at law to collect it could only have been for the purpose of defrauding the prosecutor of her money.

It is interesting to note that in only two cases decided during the nineteenth century did the courts attempt to give any reason why a mere agreement should be punished as a crime. In both, the formidable character of the combination is cited as the justification. Thus, in *Reg. vs. Duffield*¹⁰¹ (1851) Erle, J., said: "It is most obvious, in a word, that if persons, intending to break the law, are compelled to act single-handed, those on the side of the honest part of the community can very well oppose them, and for the most part keep them under, but if those who are determined to break the law combine and coöperate together for that illegal purpose, they are a much more formidable enemy, and the law has said that combination for an illegal purpose is an indictable offense."

To the same effect is the statement of Fitzgerald, J., in his charge to the jury in *Reg. vs. Parnell*¹⁰² (1881): "The agreement to effect an injury or wrong to another by two or more persons is constituted an offense, because the wrong

¹⁰¹ 5 Cox C. C. 404, 432.

¹⁰² 14 Cox C. C. 508, 514.

to be effected by a combination assumes a formidable character." From this view the limitation suggested in *Rex vs. Kenrick*¹⁰³ (1843) as to punishing combinations as criminal conspiracies follows logically. The court said, "Doubts have also been expressed how far an indictment for conspiracy may be maintained, where the object of it was of a trivial nature, or where the whole matter might be thought to sound in damage, not in crime."¹⁰⁴

There are several indications in the cases that the courts regard conspiracy as a more or less anomalous offense. Thus, in *Reg. vs. Hilbert*¹⁰⁵ (1875), Cleasby, J., said, "It [conspiracy] differs from other charges in this respect, that in other charges the intention to do a criminal act is not a crime of itself until something is done amounting to the doing or attempting to do some act to carry out that intention." This remark, however, betrays a misconception of the nature of the offense. It was brought out very clearly in the argument of counsel in *Mulcahy vs. Reg.*¹⁰⁶ that a conspiracy involves "some outward act distinct from the mere operation of the mind of one person. Two persons cannot conspire and agree without some communication, either by word or in writing." That is, the crime consists,

¹⁰³ D. & M. 208, 216.

¹⁰⁴ A somewhat similar idea as to the limitation to which the law of conspiracy should be subjected was suggested as early as 1752, in the case of *Chetwynd vs. Lindon*, 2 Ves. & Sr. 450. The defendant had demurred to such part of a bill in chancery as sought to compel her to discover a conspiracy or attempt to set up a child which she pretended to have had by a person who had lived with her and was desirous of having a child by her, because such a disclosure might subject her to penal proceedings. Lord Hardwicke said: "The question is whether it is so charged, as, if confessed in the answer, would be a ground for a criminal prosecution in a court of law; for it is not every conspiracy will be a ground for a criminal prosecution. If that was the case, almost all the causes in this court would come within that description. The boundaries are often very nice, where a matter is near indictable and a fraud in this court. This setting up a private fraud does not impede the course of descent in law so as to defeat the heir at law; for if so, it might be a conspiracy indictable; but this is to the disherison of no one; and by this means several frauds in this court might be covered by demurrer." Demurrer overruled.

¹⁰⁵ 13 Cox C. C. 82, 86.

¹⁰⁶ Q. R. Rep. 1 Com. L. 13, 28.

not in the mere intention, but in the agreement to do wrong. Since, therefore, "their agreement is an act in advancement of the intention which each of them has conceived in his mind," it was held to be an overt act sufficient to support a conviction for treason.¹⁰⁷ In this particular there seems to be no generic difference between criminal conspiracy and criminal attempt.

The principle that an agreement to do an act not in itself a crime is a punishable offense was several times attacked by counsel during the nineteenth century, but without success. The only case in which the court expressed any dissatisfaction with this principle was *Reg. vs. Warburton*¹⁰⁸ (1870). Cockburn, C. J., there said: "There may be a doubt whether the law of England is consistent in saying that what is not criminal in one man alone is criminal when done by two men. This, however, is not a case in which it is desirable to put any restriction on the rules of law relating to conspiracy." In other cases in which the point was raised the courts have been content with laying down as a matter of "common learning" that what may be done by one man with impunity may render a combination to do it guilty of conspiracy.

The consciousness of the anomalous character of conspiracy as a criminal offense appears very plainly in the case of *Reg. vs. Selsby*¹⁰⁹ (1847). Rolfe, B. (afterwards Lord Cranworth), remarks upon the fact that the defendants were indicted, not for the acts done, but for a conspiracy to do them, "the having done which is the proof of the conspiracy. It is never satisfactory, although undoubtedly it is legal."

At the present time the crime of conspiracy as defined by the law of England consists in the bare agreement to do something illegal. Any such agreement may be punished; but the courts, in passing upon specific cases, will determine whether particular unlawful combinations are serious

¹⁰⁷ L. R. 3 H. of L. 306, 316, 328.

¹⁰⁸ 11 Cox C. C. 584, 587.

¹⁰⁹ 5 Cox C. C. 495 (note).

enough in their consequences to deserve criminal penalties. Conversely, it is very improbable that the judges will hold criminal any combination which purposes committing only legal acts, however oppressive to individuals such acts may be. Even in the civil courts, in which such combinations have been most discussed, the general principle seems still to remain intact that the fact of combination will not transform an otherwise legal undertaking into an actionable wrong.¹¹⁰ The only exception has reference to certain combinations among workmen, which will be treated in the following chapter.

It would be interesting to inquire in detail as to how far the practice of punishing bare agreements to do evil can be justified upon sound principles of jurisprudence. We cannot deny that the English law relating to criminal conspiracy is unique. Being largely the creature of special circumstances, it has no parallel in the legal systems of France, Germany, and other continental countries in which the conditions under which it originated and grew were not duplicated. We may say generally, however, that the offense of conspiracy does not in reality constitute an exception to the fundamental principle that the law will not take cognizance of a bare intent to do evil. But whenever the law punishes criminal acts, it can and does examine into the intent of the actor. In all crimes the intent is at least as important as the act done; in some, it is much more important. Thus, in the crime of attempt to commit a criminal offense, the element of guilty intent is the principal factor. The nature and consequences of the act done are wholly immaterial. It appears, therefore, that in some cases at all events the law will punish an intent, provided it be manifested in an act done to effectuate it. The English courts have given open expression to this principle in discussing the crime of treason. Upon the same principle we can justify the punishment of criminal conspiracy. The latter,

¹¹⁰ *Kearney vs. Lloyd*, 26 L. R. Ir. 268; *Sweeny vs. Coote* (1906), 1 Ir. R. 51; (1907) W. N. 92.

as we have shown, consists in a criminal intent manifested by the act of agreement. It differs from criminal attempt only in respect to the nature of the act in which the intent appears.

There is some difference of opinion as to whether the English law of conspiracy has received too wide an extension. This, however, is a subject with which we need not at present concern ourselves. It will be sufficient to say that, upon the whole, the principles relating to illegal combinations play a useful part in the administration of criminal justice. Through them the law is enabled to reach a number of wrongful enterprises which would otherwise be immune from punishment. The criminal liability thus created may well operate as a deterrent upon the pernicious activities of that considerable class of citizens who feel no scruple against engaging in almost any scheme of fraud or oppression not involving the doing of acts which are in themselves indictable offenses.

CHAPTER V.

COMBINATIONS OF LABOR.

During the nineteenth century the law relating to criminal conspiracy has affected combinations of labor much less in England than it has upon this side of the Atlantic. Our English brethren have preferred to deal with this important subject by means of carefully drawn statutory enactments, whereas in America the problems growing out of the conflict between capital and labor have been thrown largely upon the courts for solution. In late years Parliamentary labor legislation has been directed against specific acts rather than against combinations to act. In years gone by, however, the element of combination occupied a prominent place in the field of labor law; and an account of its vicissitudes forms an interesting and instructive chapter in the history of our subject.

The labor problem began to engage the attention of Parliament at an early period. The first Statute of Laborers was passed in 1349 (23 Edw. III), and was aimed against the rise of wages consequent upon the Black Death. It provided that all unemployed able-bodied persons below the age of sixty years might be compelled "to serve him which so shall him require," upon pain of imprisonment. They were to take no more than the customary wages, and were not to depart from service before the end of the period agreed upon. By a second act passed in the following year (25 Edw. III, Stat. 1, 1350) the wages to be paid to the different classes of laborers were specifically prescribed, and strict provision was made for the enforcement of the law.

The policy of state regulation of labor so inaugurated was continued and extended by a number of acts subsequently passed. Attempts were made to regulate in great

detail the conditions of labor. Laborers were permitted to "use but one mystery."¹ They were restricted to the hundred in which they resided, and after they had reached the age of twelve years they were compelled to follow the trade of their fathers.² Upon leaving employment they were required to obtain testimonials, and other persons were forbidden to employ any workman who had not such a testimonial. The hours of labor, the dress which laborers should wear, the arms they might carry, the games they might indulge in, even the time to be allowed them for meals³—all these matters claimed the attention of Parliament, and the justices of the peace were directed to enforce the laws rigidly.⁴ In 1389 (13 Rich. II) statutory regulation of wages was replaced by a policy of allowing them to be prescribed at Easter and Michaelmas by a justice of the peace. This policy was continued by Statute 6 Henry VI (chap. 3, 1427), directing that wages be fixed by justices at quarter sessions, and in the towns by the mayor and the bailiffs, "because masters could not get servants without giving higher wages than allowed by the statute." Direct statutory regulation of wages was tried again in 1514 (Stat. 6 Hen. VIII, C. 3), but was finally abandoned in 1562, when the great Statute of Laborers (5 Eliz., C. 4) was passed.

This famous act was a consolidation of previous labor laws. Most of the provisions of the foregoing statutes were retained and elaborated. Wages were to be fixed and revised from time to time by justices of the peace, and the giving or taking of more than the prescribed rate was made punishable. A new feature was a careful regulation of apprenticeship.

The Act of 5 Elizabeth marks the highest point attained by state regulation of labor in England. It gradually became a dead letter, but was not finally repealed until 1875.

¹ 36 Edw. III (1362); 34 Edw. III (1360).

² 12 Rich. II (1388)—restriction as to place removed by 2 and 3 Edw. VI, C. 15, Sec. 4 (1548).

³ 12 Rich. II (1388); 6 Hen. VIII, C. 3 (1514); 4 Hen. IV (1402).

⁴ 2 Hen. V, C. 4 (1414).

"Throughout the whole of the seventeenth and the greater part of the eighteenth century," says Sir James Stephen, "no act was passed for the general regulation of trade and labor in any degree comparable in importance to the 5 Elizabeth, C. 4."⁵

The laborers themselves, however, were not pleased with this strict policy of regulation. The attempts made by them to advance their own interests in spite of the law soon developed organization, and this it was that brought the element of combination among workmen to the attention of the lawmakers. Such organizations began to grow up almost immediately after the first Statute of Laborers (23 Edw. III, 1349). Eleven years after its passage, Parliament mildly declared void "all alliances and covins between masons, carpenters and guilds, chapters and ordinances." The ineffective character of this prohibition and the strength of the resistance engendered by the labor laws of the reigns of Edward III, Richard II, Henry IV and Henry V are evidenced by the peremptory terms of the statute 3 Henry VI, C. 1 (1424). Reciting that "by the annual congregations and confederacies made by the masons in their general chapters assembled the good course and effect of the statute of laborers are publicly violated and destroyed in subversion of the law," the act commanded "that such chapters and congregations be not henceforth held," under severe penalties.

The growth and increased efficiency of the rudimentary combinations of labor which sprang up during the following century and a quarter find an eloquent testimonial in the next act upon the subject, "The Bill of Conspiracies of Victuallers and Craftsmen," Statute 2 and 3 Edward VI, C. 15 (1548). This statute enacted that "if any artificers, workmen or laborers do conspire, covenant or promise together, or make any oaths, that they shall not make or do their works but at a certain price or rate, or shall not enterprise or take upon them to finish that another hath begun,

⁵ "History of the Criminal Law of England," Vol. 3, p. 205.

or shall not do but a certain work in a day, or shall not work but at certain hours and times; that then every person so conspiring, covenanting, swearing or offending" shall suffer a fine of £10 or twenty days' imprisonment for the first offense, and a severer punishment for subsequent offenses. Moreover, section 2 provided that such a conspiracy entered into by a majority of any society, brotherhood or company of such persons should work an instant dissolution of their charter, besides subjecting them individually to the above penalties.

The Elizabethan Statute of Laborers (5 Eliz., C. 4, 1562) said nothing about combinations of labor. The law was silent upon this subject until the year 1720, when the first of the notable eighteenth century statutes against combinations among laborers was passed.

This act (7 Geo. I, Stat. 1, C. 13) was directed against combinations among journeymen tailors. It enacted "that all contracts, covenants and agreements . . . made or entered into . . . by or between any persons brought up in, or professing, using or exercising the art or mystery of a taylor, or journeyman taylor . . . shall be and are hereby declared to be illegal, null and void to all intents and purposes;" and any one convicted before two justices of the peace of remaining in such combinations after May 1, 1721, might be committed to the House of Correction or to the common gaol for not more than two months.

Four years later (12 Geo. I, C. 34, 1725) a statute entitled "An act to prevent unlawful combinations of workmen employed in the woollen manufactures, and for better payment of their wages" similarly provided that contracts and agreements, by-laws and ordinances made and entered into by such workmen for regulating the prices of their goods, or raising their wages, or shortening their hours of labor, should be "illegal, null and void to all intents and purposes." Those who entered into or remained in such combinations after June 24, 1726, might be summarily punished as described in Act 7 George I. Subsequent acts made like provision against combinations of workmen in

other specified trades. The Act 22 George II, C. 27, Sec. 12 (1749), extended the operation of Act 12 George I, after June 24, 1749, to journeymen dyers, hot pressers and others engaged in the manufacture of woollens; also to all workmen employed in the making of felts and hats, and in the fur, iron, leather, mohair, fustian and various textile manufactures. In 1777 (17 Geo. III, C. 55) an act was passed more especially directed against the organization and meeting of societies and clubs of persons working at the manufacture of hats. By the Act 36 George III, C. 111 (1796), provisions similar to the foregoing series were extended to workmen employed in the paper trade.

The culmination of the anti-combination laws was reached in the Acts of 39 and 40 George III (1799, 1800), which contained general enactments similar to the specific prohibitions in previous acts. These famous statutes represented the highest point ever reached by repressive labor legislation in England.

Reciting the prevalence of unlawful combinations among workmen, and the ineffectiveness of former laws to suppress them, the Act 39 George III, C. 81, enacted "that from and after the passing of this act all contracts, covenants and agreements whatsoever . . . heretofore made or entered into between any journeymen manufacturers or other workmen, or other persons within this kingdom, for obtaining an advance of wages of them, or any of them, or any other journeymen manufacturers or workmen, or other persons in any manufacture, trade or business, or for lessening or altering their or any of their usual hours or time of working, or for decreasing the quantity of work, or for preventing or hindering any person or persons from employing whomsoever he, she or they shall think proper to employ in his, her or their manufacture, trade or business, or for controlling or any way affecting any person or persons carrying on any manufacture, trade or business, in the conduct or management thereof, shall be, and the same are hereby declared to be illegal, null and void to all intents and purposes whatsoever."

Section 2 provided further that "no journeyman, workman, or other persons" at any time after the passage of this act should enter into, "or be concerned in the making of or entering into" such illegal contract, covenant or agreement; and "every journeyman workman, or other person, who, after the passing, shall be guilty of any of the said offenses," being convicted in a summary proceeding before justices of the peace, should be imprisoned in the common gaol for not more than three months, or in a House of Correction at hard labor for not more than two months.

Section 3 imposed the same penalty upon "every workman who shall at any time after the passing of this act enter into any combination to obtain an advance of wages, or to lessen or alter the hours or duration of the time of working, or to decrease the quantity of work, or for any other purpose contrary to this act." The other offenses similarly punished were certain acts done by individuals, which were made criminal without regard to the element of combination.

Sections 4 and 5 were more particularly aimed at trade unions. "For the more effectual suppression of all combinations among journeymen" and other workmen, section 4 pronounced the same punishment against persons who might attend, or in any way endeavor to induce any workman to attend, any meeting held for the purpose of forming or maintaining any agreement or combination for any purpose declared illegal by this act, or who might endeavor in any manner to induce any workman to enter into or be concerned in any such combination; also against those who should collect or receive money from workmen for any of the aforesaid purposes, or who should pay or subscribe money toward the support or encouragement of any such illegal meeting or combination. Section 5 imposed a penalty of £5 or imprisonment upon any person who might contribute toward the expenses incurred by any persons acting contrary to the statute, or toward the support or maintenance of any workman for the purpose of inducing him to refuse to work or be employed. By section 6 money

already contributed for any purpose forbidden by the act, unless divided within three months after its passage, was declared forfeited.

The remainder of the act (sections 7-17) prescribed in detail the manner of its execution, and granted supplementary powers essential thereto.

In the following year (1800) it was found "expedient to explain and amend" the foregoing act, and accordingly the Acts of 39 and 40 George III, C. 106, were passed for this purpose. The later act repealed the former, and substituted other provisions in its place. The first sixteen sections of the new act, however, were identical with the corresponding sections of the old, except for a few minor improvements, chiefly verbal. But the new act introduced two novel features. Section 17 declared that all contracts and agreements between "masters or other persons, for reducing the wages of workmen, or for adding to or altering the usual hours or time of working, or for increasing the quantity of work," should be illegal and void; and any person convicted in a summary proceeding before any two justices of the peace of entering into such an agreement should forfeit £20, or be imprisoned in the gaol or the House of Correction for not less than two or more than three months. Sections 18 to 23 provided an elaborate system for the compulsory arbitration of trade disputes.

The net result of the above mentioned acts (in so far as they concern our present purpose) was to render illegal and criminal any and every combination among masters or workmen to fix the wages or alter the conditions of labor.

The Anti-Combination Acts of George III were passed during the period of the dominance of Old Toryism, but even at that time the new school of Individualism was issuing its challenge to the reactionary and oppressive doctrines of the older school. The manner in which the teachings of Bentham and his disciples gained the ascendancy need not be detailed here. It will be sufficient to note that just twenty-five years after the Acts of 39 and 40 George III the entire legislative policy of England toward combina-

tions of labor was fundamentally transformed. This change was brought about by two acts: 5 George IV, C. 95 (1824), and 6 George IV, C. 129 (1825).⁶

The first of these statutes began with a long section repealing, specifically and generally, all former "laws, statutes and enactments now in force throughout or in any part of Great Britain and Ireland" relative to combinations of workmen for the purposes therein specified. It then enacted (sec. 2) "that journeyimen, workmen, or other persons who shall enter into any combination to obtain an advance, or to fix the rate of wages, or to lessen or alter the hours or duration of the time of working, or to decrease the quantity of work, or to induce another to depart from his service before the end of the time or term for which he is hired, or to quit or return his work before the same shall be finished, or not being hired, to refuse to enter into work or employment, or to regulate the mode of carrying on any manufacture, trade or business, or the management thereof, shall not therefore be subject or liable to any indictment or prosecution for conspiracy, or to any other criminal information or punishment whatever, under the common or statute law." By section 3 masters entering into combinations for the opposite purposes were exempted from punishment to a like extent.

Laboring men and others were regulated by means of the prohibition of certain specified acts, whether performed by an individual or by a combination. Section 5 provided that "if any person by violence to the person or property, by threats or by intimidation shall wilfully or maliciously force another" to cease working or to refuse employment, or should employ the above methods toward another on account of his not complying with rules, orders, or regulations made to obtain an advance of wages, etc., or should endeavor by such means to force an employer to change his

⁶ "To the desire to extend contractual freedom belongs the reform in the Combination Law, effected under the direct influence of the Benthamite school in accordance with the principles of individualism by means of the two Combination Acts of 1824-1825." Dicey, "Law and Opinion in England," p. 190.

mode of conducting his business, the offender should be imprisoned for not more than two months. Section 6 imposed the same punishment upon persons who "combine and" do the above things, the criminality being evidently attributed to the acts done, not to the mere combining to do them. The other sections provided summary proceedings for cases arising under the act, and contain other matter relating to procedure.

The Act of 5 George IV, C. 95, remained in force but a single year. It was repealed and replaced by the Act of 6 George IV, C. 129 (1825). The details of the former act, and not its underlying principle, are changed. After reciting that the provisions of the Act of 5 George IV, C. 95, "have not been found effectual," and after reënacting the long repealing section of the former act, the new statute (first repealing the old one) forbids the accomplishment, "by violence to the person or property, or by threats or intimidation, or by molesting or in any way obstructing another," of certain purposes. These were but a more comprehensive enumeration of the purposes forbidden by 5 George IV, C. 95, Sec. 5, and embrace the following: forcing or endeavoring to force, by the above means, any workman to quit work, to return his work before the same shall be finished, to refuse to accept employment, to belong to any club or association, to pay any fine or penalty for not belonging to such club or for not complying with any order of regulation for the advancement of the unionists' policies or for not contributing to the union funds; also, by the above methods, forcing or endeavoring to force any employer to alter the mode of carrying on his business, to limit the number of his apprentices, or to limit the number or description of his workmen. "Every person so offending, or aiding, abetting or assisting therein" was made liable, upon conviction in a summary proceeding, to imprisonment at hard labor for not more than three months.

The above acts were rendered criminal whether perpetrated by an individual or by a combination. Certain labor combinations, however, by a carefully drawn section of

narrower scope than the corresponding section of the former act, were expressly declared not to be criminal, in these words (sec. 4): "Provided always, and be it enacted, That this act shall not extend to subject any persons to punishment, who shall meet together for the sole purpose of consulting upon and determining the rate of wages or prices, which the persons present at such meeting or any of them, shall require or demand for his or their work, or the hours or time for which he or they shall work in any manufacture, trade, or business, or who shall enter into any agreement, verbal or written, among themselves, for the purpose of fixing the rate of wages or prices which the parties entering into such agreement, or any of them, shall require or demand for his or their work, or the hours or time for which he or they will work, in any manufacture, trade or business; and that persons so meeting for the purposes aforesaid, or entering into any such agreement as aforesaid, shall not be liable to any prosecution or penalty for so doing; any law or statute to the contrary notwithstanding." Section 5 extended the same protection in the same words to masters who meet, consult and agree upon rates of wages and times of working to be paid to or required of their journeymen, workmen or servants.

The policy of making cognizable the acts done irrespective of the combination, and also of allowing the workmen freedom to combine as far as compatible with the legitimate interests of the employer and of the public, was continued and extended in subsequent acts. Most of these were intended to specify with greater accuracy and detail what particular methods workmen might not employ in furtherance of trade disputes. Attempts to widen their right to combine, however, were made in a few instances. The Act of 22 Victoria, C. 34 (1859), explanatory of the Act of 6 George IV, C. 129, declared "that no workman or other person, whether actually in employment or not, shall by reason merely of his entering into an agreement with any workman or workmen or other person or persons, for the purpose of fixing or endeavoring to fix the rate of

wages or remuneration at which they or any of them shall work . . . be subject to any prosecution or indictment for conspiracy." A further protection to trade unions in this respect was given by the Acts of 34 and 35 Victoria, C. 31, Sec. 2: "The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise." This principle was retained in the Acts of 34 and 35 Victoria, C. 32 (proviso at end of Sec. 1), which repealed Acts 6 George IV, C. 129, and 22 Victoria, C. 34. The final stage in the decadence of the importance of criminal conspiracy as applied to labor combinations is to be found in the Conspiracy and Protection of Property Act, 1875, 38 and 39 Victoria, C. 86. Section 3 of this act provided: "An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employees and workmen shall not be indictable as a conspiracy if the same act committed by one person would not be punishable as a crime." This provision extends to combinations for the above purposes a protection from prosecution not enjoyed by combinations with different objects. The Trade Disputes Act, 1906 (6 Edw. VII, C. 47), similarly denied to the element of combination any effect even upon the civil liability incurred by workmen for what they might do in the conduct of a strike, etc., providing (sec. 1), "An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable."

From the history of legislation touching combinations of labor we turn to a review of the decisions of the courts upon the same subject.

Up to the year 1721 combinations among workmen to raise their wages or otherwise to alter the conditions of labor were apparently not regarded as criminal conspiracies

at common law. Such combinations were certainly not included in the Definition of Conspirators (33 Edw. I). As long as conspiracy retained its original technical meaning and narrow scope, of course neither court nor counsel would be likely to think that combinations of labor were judicially cognizable. Hence the number of early statutes upon the subject. The frequency of these acts, and the terms in which they were couched, would seem to indicate a belief that the combinations prohibited were being made unlawful for the first time. Indeed, since the objects for which these combinations were formed were for the most part forbidden by the various statutes of laborers, the early anti-combination laws tend to show that the definition of conspiracy was not currently regarded as including even combinations to violate a statute.

In 1721 (8 Geo. I), just one year after the passage of the act declaring illegal all combinations among tailors to raise their wages, etc., the famous case of the *King vs. The Journeymen Tailors of Cambridge*⁷ arose. This decision, which declared that a combination to raise wages was a conspiracy at common law, so profoundly affected the attitude of the courts toward such combinations in later times that a careful analysis of it should be made.

One Wise and several other journeymen tailors, of or in the town of Cambridge, were indicted for a conspiracy to raise their wages. Upon a verdict of guilty they moved in arrest of judgment. Among other objections it was urged that no crime appeared upon the face of the indictment, "for it only charges them with a conspiracy and refusal to work at so much per diem, whereas they are not obliged to work at all by the day, but by the year, by 5 Eliz., C. 4." In reply, the prosecution boldly affirmed "that the refusal to work was not the crime, but the conspiracy to raise the wages."

The court sustained the position of the prosecution. "The indictment," they held, "it is true, sets forth, that the defendants refused to work under the wages which they

⁷ 8 Mod. 11 (Nov. 6, 1721).

demand; but although these might be more than is directed by the statute, yet it is not for the refusing to work, but for conspiring, that they are indicted, and a conspiracy of any kind is illegal, although the matter about which they conspired might have been lawful for them, or any of them, to do, if they had not conspired to do it, as appears in the case of the Tubwomen vs. The Brewers of London."

The defendants further urged that since the offense was a crime within the Stat. 2 and 3 Edward VI, C. 15, and the "late Statute 7 Geo. I, C. 13," the indictment should have concluded "*contra formam statuti*." For the king it was replied that the defendants had been indicted, not for "the denial to work except for more wages than is allowed by the statute, but it is for a conspiracy to raise their wages," which is "an offense at common law." The court again sustained the prosecution, saying, "This indictment need not conclude *contra formam statuti*, because it is a conspiracy, which is an offense at common law." Accordingly, the judgment "was confirmed by the whole court *quod capiantur*."

The authority of the Journeymen Tailors' Case has been called in question by later writers, and doubts have been thrown upon the authenticity of the report which has been preserved to us. There is indeed little question that the case represents a notable piece of judicial legislation. The principles laid down in it, however, are thoroughly in harmony with the development then taking place in the law of conspiracy in general. They can be deduced from certain wider principles current at the time, and are enforced by several cases of an analogous character decided previously.⁸

⁸ As to the statement that "a conspiracy of any kind is illegal," etc., Wright says: "This general expression was in no way necessary for the decision; it is not supported by its reference (Starling); and it amounts to the proposition which is negatived by every previous and subsequent authority, that combination is per se criminal, independently of its purposes. Moreover that the report is untrustworthy appears from the fact that the reporter makes the arguments as to a case at Cambridge turn on the 7 George I, C. 13, which did not apply to Cambridge, but only to the metropolis." Wright on Conspiracy, p. 42.

However this may be, the fact remains that the Journeymen Tailors' Case settled the law for the time being that a combination of the kind therein discussed was a criminal

In defense of the Journeymen Tailors' Case, however, we may adduce the following considerations: (1) The proposition that what is lawful for one person to do may yet render unlawful a combination to do it would by no means have seemed absurd in 1721. Several earlier cases had held criminal a combination to do an act not in itself a crime. Moreover, the two Star Chamber decisions directly in point (see note 7, pp. 55, 56) had never been overruled. In addition, Sterling's Case was well calculated to produce the impression that the court had approved this principle. That it was so interpreted is indicated by the language used in the argument of counsel in *Reg. vs. Thorp*, 5 Mod. 221, 223 (1696): "That which is lawful for one man to do, may be made unlawful to be done by conspiracy: for instance, it is lawful for any brewer to brew small beer, but if several shall conspire together to brew no small but all strong beer, on purpose to defraud the king of his duties, such conspiracy is unlawful. And so it was held in *Sir Samuel Sterling's Case*," etc. Moreover, the prominence given to the element of conspiracy in *Reg. vs. Best*, decided but a few years before (1705), doubtless had its effect likewise. So there is nothing improbable in the view taken by the court in the Journeymen Tailors' Case if the attendant circumstances be borne in mind. (2) *Rex vs. Sterling*, however, had marked the beginning of the principle that a combination to injure the public was undoubtedly criminal. There can be little doubt that such a combination of workmen was regarded as highly prejudicial to the public welfare. This clearly appears in the language of the Act of 7 George I, St. 1, C. 13, and in the industrial history of the period. The treatment likely to be accorded to a combination to raise wages, moreover, is significantly foreshadowed by the cases holding illegal the endeavor by individuals and combinations to raise artificially the price of merchandise. See 27 Lib. Ass., Ch. 44, Item 19; 29 Lib. Ass., f. 166, pl. 45; *Anon.*, 3 Inst. 196; *Lombard's Case*, 41 Lib. Ass., f. 38; *Rex vs. Sterling*, 1 Keb. 655.

In view of these circumstances, there seems to be little room for doubt either as to the authenticity of the report of the Journeymen Tailors' Case, or as to the soundness of the decision judged according to the standard of contemporaneous conditions.

We may note, also, that not only was this case accepted without criticism or comment at the time, but it was never drawn in question even in the nineteenth century until Mr. Wright himself attacked it. It was cited with approval by Lord Brampton in *Quinn vs. Leatham*, 70 L. J. P. C. 76 (1901).

The general criticism which may be passed upon Mr. Wright's book is well expressed by Professor Dicey: "Wright's Law of Criminal Conspiracies—published before, but not republished after he was raised to the bench—contains elaborate arguments to show that this extension [i e., of the law of conspiracy in general] was illegitimate, and was not really supported by the authorities on which it is supposed to rest. From a merely historical point of view these arguments have great force, but from a merely legal point of view their effect is diminished by the reflection that sim-

conspiracy apart from legislative enactment. This appears both from the statutes and from the cases. The language of the former undergoes an immediate change. The phraseology of the Act of 12 George I, C. 34, passed four years after the decision of the above case, as compared with the Act of 7 George I, enacted the year before, is very significant.⁹ Without going into details, it may be said that the language of the statutes passed after 1721 unmistakably indicates that the combinations attacked were looked upon as already contrary to law, and that the purpose of the acts was to declare the law and to make "more effectual provision . . . against such unlawful combinations."¹⁰

Turning now to the cases, we find the doctrine of the *Journeymen Tailors' Case* approved obiter by Lord Mansfield. In *Rex vs. Eccles*¹¹ (1783) he said: "The illegal combination is the gist of the offense, persons in possession of any articles of trade may sell them at such prices as they individually may please, but if they confederate and agree not to sell them under certain prices, it is conspiracy; so every man may work at what price he pleases, but a com-

ilar arguments if employed by a lawyer of as wide historical information and of as keen logical acumen as Sir R. S. Wright, would shake almost every accepted principle of English law, in so far as it does not depend upon statute." "Law and Opinion in England," p. 97, note.

⁹ Thus the Act 7 George I, Stat. 1, C. 13 (1720), recites that the combinations among the tailors to raise their wages, etc., were "of evil example and manifestly [tend] to the prejudice of trade, to the encouragement of idleness and to the great increase of the poor; For remedy thereof" it is enacted that such combinations, etc., "shall be and are hereby declared to be illegal, null and void to all intents and purposes."

Act 12 George I, C. 34, however, entitled "An Act to prevent unlawful combinations of workmen," etc., recites the formation of "unlawful clubs and societies," and their presuming "contrary to law to enter into combinations;" also, that such persons "so unlawfully assembling and associating themselves" have committed violence; and that "more effectual provision should be made against such unlawful combinations . . . and for bringing all offenders in the premises to more speedy and exemplary justice."

This language, which is followed by the later statutes, including the Acts 39 & 40 George III, clearly shows that the above combinations were regarded as already unlawful.

¹⁰ Preamble, 39 Geo. III, C. 81.

¹¹ 1 Leach Cr. L. 274, 276.

bination not to work under certain prices is an indictable offense." The same principle was cited in the argument of counsel for the king in *Rex vs. Mawbey*¹² (1796), and was recognized (though again obiter) by Grose, J., in the same case, thus: "In many cases an agreement to do a certain thing has been considered as the subject of an indictment for a conspiracy, though the same act, if done separately by each individual without any agreement among themselves, would not have been illegal. As in the case of journeymen conspiring to raise their wages; each may insist on raising his wages, if he can; but if several meet for the same purpose, it is illegal, and the parties may be indicted for a conspiracy." The above passages, together with the language of Grose and Lawrence, JJ., in *Rex vs. Marks*¹³ (1802), clearly indicate that the courts of the eighteenth century entertained little doubt as to the illegality at common law of the combinations prohibited by the Acts 39 and 40 George III, and that they were also thoroughly in accord with the economic views which those statutes embodied.

There are but two cases¹⁴ in the books arising out of the Anti-Combination Laws of George III. In only one of these (*Rex vs. Ridgeway*) was a combination to raise wages punished. The question there was as to the sufficiency in point of form of the conviction drawn up by the justices who had tried the case. The Court of King's Bench, quashing the order of the court of sessions holding the conviction defective in form, merely decided that the conviction was sufficient.

The most important cases relating to combinations of labor came after the Act of 6 George IV, C. 129. This statute, as we have seen, expressly legalized agreements among workmen or masters to raise or lower wages, but prohibited the accomplishment of this and other purposes

¹² 6 T. R. 619, 628, 636.

¹³ 3 East 157. See post, p. 146.

¹⁴ *Rex vs. Ridgeway* (1822), 5 B. & A. 527; *Rex vs. Nield et al.* (1805), 6 East 415.

by force, threats, obstruction or molestation. As soon, however, as the workmen endeavored to exercise the right of combination so conferred upon them, they came into immediate conflict with the courts. The judges had not experienced that complete change of opinion which had led Parliament to repeal the Anti-Combination Laws. They were desirous of protecting the master, as far as possible, from what they considered undue interference at the hands of his dissatisfied employees. The result was to confine within very narrow limits the privileges granted by the statute. This object the courts attained largely through the agency of the common-law doctrines regarding criminal conspiracy. The cases upon this subject, therefore, merit careful examination. Our present purpose, however, requires us only to ask, "How far was the definition of conspiracy modified or extended by the demands so put upon it?"

Whatever may have been the views of the judges as to the legality or illegality *per se* of a strike, it seems never to have been suggested, after the 6 George IV, C. 129, that a combination among workmen to secure an increase in their wages by a concerted refusal to work was a criminal conspiracy. It was never even urged in argument that the damage thus inflicted upon the employer might amount to an obstruction or molestation within the meaning of the act. This, however, is not surprising. The statute plainly contemplated the use of the strike as a means of making effective the combination to raise wages. The matter was regarded as too obvious for comment, as appears in the language of Rolfe, B. (afterwards Lord Cranworth), in *Reg. vs. Selsby et al.*¹⁵ (1847): "It is doubtless lawful for people to agree among themselves not to work except upon certain terms."

Up to this point the law was clear. But a strike cannot succeed if the employer is allowed to engage new workmen in the strikers' places and to carry on his business unham-

¹⁵ 5 Cox C. C. 495 (note), 498.

pered. Hence, the courts were soon called upon to decide whether a concerted effort on the part of the ex-employees to procure a cessation of labor by the strike-breakers was lawful under the statute.

This point was first raised in *Reg. vs. Selsby et al.*¹⁶ (1847), the case just spoken of. There the strikers' attempts, by means of pickets, persuasion, handbills, etc., to induce the new workmen to quit work caused them to be indicted for a conspiracy to impoverish the employers. The court ruled that the question was as to the character of the methods utilized. If the strikers or the pickets had used threats or intimidation, they were guilty of conspiracy: these are "illegal means." But as to persuasion and peaceable inducement, he said: "It is doubtless lawful for people to agree among themselves not to work except upon certain terms; that being so, I am not aware of any illegality in their peaceably trying to persuade others to adopt the same view. . . . My opinion is, that if there was no other object than to persuade people that it was their interest not to work except for certain wages, and not to work under certain regulations complied with in a peaceable way, that it was not illegal. If I am wrong, I am sorry for it, but my opinion is, that this is the law."

Doubts, however, were cast upon this doctrine by the language of Erle, J., in *Reg. vs. Duffield*¹⁷ (1851), and in *Reg. vs. Rowlands* (1851), both of which cases arose out of the same events. In the *Duffield* case, after conceding the right of workmen to combine to fix their wages by refusing to work, he said (p. 431): "But . . . I think it would be most dangerous . . . to suppose that workmen, who think that a certain rate of wages ought to be obtained, have a right to combine together to induce men, already in the employ of their masters, [to leave] for the purpose of compelling those masters to raise their wages. . . . I take it for granted that if a manufacturer has got a manufactory, and his capital embarked in it for the purpose of

¹⁶ 5 Cox C. C. 495 (note).

¹⁷ 5 Cox C. C. 404; Q. B. 436.

producing articles in that manufactory, if persons conspire together to take away all his workmen, that would necessarily be a molesting of him in his manufactory. . . . That . . . would certainly be a conspiracy for an unlawful purpose." This principle was reaffirmed in *Rex vs. Rowlands*. If, he instructed the jury (p. 462), "the combination was for the purpose of obstructing Messrs. Perry in carrying on their business, and so to force them to consent to this book of prices, and in pursuance of that concert, they persuaded the free men and gave money to the free men to leave the employ of Messrs. Perry, the purpose being to obstruct him in his manufacture, and so to force his consent, I am of opinion that that also would be a violation in point of law." The defendants were convicted of conspiracy, and the conviction was sustained by the Court of Queen's Bench upon appeal.¹⁸

The uncertainty created by these conflicting opinions, together with the caution uttered by Erle, J., to outsiders joining with workmen to aid the latter to secure an increase of wages, led to the enactment of the Statute 22 Victoria, C. 34 (1859). Reciting that "different decisions have been given on the construction" of 6 George IV, C. 129, it declared that no person, "whether actually in employment or not," who should endeavor "peaceably and in a reasonable manner, and without threat or intimidation, direct or indirect, to persuade others to cease or abstain from work" to obtain an increase of wages or to improve the conditions of labor, "shall be deemed or taken to be guilty of 'molestation' or 'obstruction,' within the meaning of the said act, and shall not therefore be subject or liable to any prosecution or indictment for conspiracy." The above provision, however, was not to apply if the strikers or the strike-breakers were bound by contracts of service.

In several subsequent cases¹⁹ it was decided that the Statute 22 Victoria, C. 34, had legalized peaceable per-

¹⁸ 2 Den. C. C. R. 364.

¹⁹ *Reg. vs. Druitt* (1867), 10 Cox C. C. 592; *Reg. vs. Hibbert* (1875), 13 Cox C. C. 82.

suation to quit work, "no matter what the consequences were."²⁰ It was also announced, as a corollary to this proposition, that a peaceful picket system, whose purpose was merely persuasion and inducement to quit work, was lawful. The courts were careful to state, however, that such pickets would be allowed to resort to no manner of threat or intimidation.

The attitude of the courts toward even peaceful picketing changed after the passage of the Acts of 1871 and 1875. Both of these statutes endeavored to define what should be considered "molestation and obstruction" upon the part of the workmen. The Act of 1871 declared that a person should be deemed to molest or obstruct another person. ". . . (3) If he watch or beset the house or other place where such person resides or works, or carries on business, or happens to be, or the approach to such house or place." Section 7 then repeals the 6 George IV, C. 129, and the 22 Victoria, C. 34. But the instruction of *Cleasby, B., in Reg. vs. Hibbert et al.*²¹ (1875), showed clearly that the court still regarded peaceful picketing as lawful, and did not consider a combination so to picket as a criminal conspiracy, notwithstanding the passage of the Act of 1871 and the repeal of the 22 Victoria, C. 34. The Act of 1876, accordingly, was somewhat differently worded in this respect. Section 7 imposed a penalty of fine and imprisonment upon "every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority. . . . (4) Watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place." Then a subsequent clause of the same section said that "attending at or near the house or place where a person resides, or works, or carries on business, or happens to be, or the approach to such house or place, in order merely to obtain or communi-

²⁰ *Reg. vs. Shepherd*, 11 Cox C. C. 325 (1869).

²¹ 13 Cox C. C. 82, 87.

cate information, shall not be deemed a watching or besetting within the meaning of this section."

The courts, quite properly it would seem, took the view that the language in which section 7 of the later act was couched manifested an intention to forbid picketing for any purpose other than the gathering and communication of information. This point is well brought out in a bit of dialogue which occurred in *Reg. vs. Bauld*²² (1876). Parry, Serjeant, argued: "As to the charge of 'watching' and 'besetting' your Lordship is aware that there are two views which may be taken. If it were merely done for the purpose of persuading the men to quit their employment it would not be illegal.

"Huddleston, B.—I cannot assent to that view of the law. The statute allows watching or attending near a place for the purpose of obtaining or communicating information, but this is the only exception.

"Parry, Serjt.—I accept your Lordship's correction, and I am sure that the men will accept your Lordship's exposition of the law now that they have heard it."

The Act of 1876 was similarly construed in the later cases. In *Lyons vs. Wilkins*²³ (1898) an injunction was granted to restrain the defendants "from watching or besetting the plaintiffs' works for the purpose of persuading or otherwise preventing persons from working for them or for any purpose except merely to obtain or communicate information." The decree of the lower court was confirmed by the Court of Appeal.²⁴ During the following year (1899) two injunctions were issued forbidding the strikers to attend at steamboat landings and railroad stations to persuade incoming strike-breakers to go away.²⁵ The theory embodied in all these cases was simply that such acts constituted a "watching and besetting" for pur-

²² 13 Cox C. C. 282, 283.

²³ 65 L. J. Ch. 601, 604.

²⁴ 68 L. J. 146.

²⁵ *Charnock vs. Court*, 2 Ch. (1899), 35. *Walters vs. Green*, 68 L. J. 730.

poses other than the gathering and communication of information, and were therefore in violation of the Act of 1875.²⁶

It is clear that the decisions of the courts in respect to combinations for the above purposes do not in any way modify or extend the general conception of criminal conspiracy. In each case the question was whether the acts complained of amounted to violations of the statutes. If this question were answered in the affirmative, the combination then had for its object the commission of a statutory crime. The illegal character of its design was thus manifest, and the agreement clearly fell within Lord Denman's definition of conspiracy. That this was the view taken by the courts appears from the language sometimes employed, and it is also evidenced by the fact that in many—particularly the later—cases individuals were often punished for persuading others to strike, for picketing, and the like, without reference to the element of combination which might be present. And when the injunction began to take the place of criminal prosecutions in such cases, all mention of combination as a constituent of the offense practically ceased.

What has just been said applies all the more fully to combinations to advance the interests of workmen or masters by acts or threats of physical violence and intimidation.

²⁶ This principle endured until changed by statute. The Trades Disputes Act, 1906, provides (sec. 2): "It shall be lawful for one or more persons acting on their own behalf or on behalf of a trade union or of an individual employer or firm in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides or works or carries on business or happens to be if they so attend merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working." Section 7 of the Act of 1875 is repealed from "attending at or near" to the end of the section.

The latest case upon the subject of picketing is *Ward, Lock & Co. vs. Operative Printers' Assistants' Society* (1906), 22 T. L. R. 327. Here the court held that a picket for the purpose of requesting workmen to become members of the union was not an offense within the Act of 1875. It was said that the object of section 7, subsection 4 of that act was to give a summary criminal remedy in respect to certain specified classes of acts for which there had previously been only a civil remedy. In other words, picketing was not criminal under the act unless it was of such character as to amount to a civil wrong at common law.

Such methods are mala in se as well as mala prohibita, and render punishable the individual who employs them as well as the several individuals who combine to employ them. The same is, of course, true if the acts to be performed are violatory of the statute, although not mala in se. These are criminally cognizable, whether done by a single person or by a combination;²⁰ and in recent years the practice has arisen of restraining them in proper cases by injunction.²¹

A more difficult question is raised by combinations among workmen to force their master, by threatening to strike, to discharge certain persons already in his service; or to compel satisfied employees, by threats of expulsion from the

²⁰ See *Reg. vs. Harris et al.* (1842), 1 C. & M. 661 (note); *Reg. vs. Selby et al.* (1847), 5 Cox C. C. 424; *Reg. vs. Duffield et al.* (1851), 5 Cox C. C. 494; *Reg. vs. Rowlands* (1851), 5 Cox C. C. 436; 2 Den. C. C. R. 364; *Reg. vs. Druitt et al.* (1867), 20 Cox C. C. 392; *Springhead Spinning Co. vs. Riley* (1868), L. R. 6 Eq. 351 (this is the first case in which an injunction was issued in a labor dispute); *Reg. vs. Shepherd* (1869), 11 Cox C. C. 323; *Reg. vs. Hibbert et al.* (1875), 13 Cox C. C. 82; *Judge vs. Bennett* (1882), 52 J. P. 247 (held, that the character of the picket, as coercive and menatory or not, must be determined with reference to the effect actually produced by it); *Smith vs. Thomaston* (1890), 14 Cox C. C. 740 (a case of "persistent following" within the Act of 1875); *Kennedy vs. Cowie* (1891), 60 L. J. M. C. 170; *Reg. vs. Kennedy* (1892), 61 L. J. M. C. 181; *Reg. vs. Edmondes* (1895), 59 J. P. 776; *Ex Parte Wilkins et al.* (1895), 64 L. J. M. C. 221; *Smith vs. Moody* (1902), 72 L. J. K. B. 43.

²¹ The first case arising out of a trade dispute in which an injunction was issued seems to be *Springhead Spinning Co. vs. Riley* (1868), L. R. 6 Eq. 351, in which the court enjoined a trade label which was part of an unlawful scheme of coercion and intimidation. We do not find another such case until 1892, when two injunctions were granted against the distribution of false and malicious circulars: *Collard vs. Marshall & Co.* (1892), 571; *Pink vs. Federation of Trades and Labor Unions*, 67 L. T. 252.

From this time on injunctions became quite common. See *Trotter vs. London Building Trades Federation*, 72 L. T. 342 (1895); *Lyons vs. Wilkins*, 65 L. J. Ch. 601 (1898); *Charnock vs. Court.* (1899), 2 Ch. 35; *Waters vs. Green*, 68 L. J. Ch. 730 (1899); *Taff Vale Ry. Co. vs. Amalgamated Society of Railway Servants*, 70 L. J. Q. B. 905 (1901); *Chamberlain's Wharf Ltd. vs. Smith* (1900), 2 Ch. 605.

After the *Taff Vale* case (*supra*), both damages and an injunction were sometimes asked and granted. See *Quinn vs. Leathern*, 70 L. J. K. C. 76 (1901); *Quinn vs. National Amalgamated Laborers' Union of Great Britain and Ireland* (1903), 2 K. B. 600; *South Wales Miners' Federation vs. Glamorgan Coal Co.*, 74 L. J. K. B. 525 (1905).

union, boycotting, etc., to quit work. These cases are at first perplexing, but upon closer examination they are seen to present no real exception to the principle that a criminal conspiracy must have an illegal object or make use of illegal means.

The cases in which the defendants were indicted for a combination of the kind just described are few. The first was *Rex vs. Bykerdyke*²⁹ (1832). The charge was a conspiracy to compel the discharge of certain workmen by threat of a strike. It was argued in behalf of the defendants that the men had a right to combine not to work by virtue of the Act of 6 George IV, C. 129. The prosecution replied that the statute would not protect a combination of the present character, but only a combination to obtain higher wages, to regulate hours of work, etc. The court took this view, and instructed the jury "that the statute never meant to empower workmen to meet and combine for the purpose of dictating to the master whom he should employ; and that this compulsion was clearly illegal."

The only other case in which the indictment was grounded upon a conspiracy for the above purpose was *Reg. vs. Hewitt et al.*³⁰ (1851). Here was an indictment for "a combination by workmen, contrary to 6 George IV, C. 129, and for a conspiracy." The defendants were officers and members of the Philanthropic Society of Coopers, a benefit society providing sick and funeral benefits. The society, in accordance with its rules, had inflicted upon Charles Evans, a member, a fine of £10 for working in a yard in which steam machinery was used. Upon his refusal to pay, the other members struck against him, and he was in consequence deprived of his employment. Lord Campbell said that the society was legal and beneficial, "but it cannot be permitted that, under the guise of such laudable objects, the members shall enter into a combination or conspiracy to injure others. By law every man's labor is his own property, and he may make what bargain he pleases

²⁹ 1 Moo. & R. 179.

³⁰ 5 Cox. C. C. 162.

for his own employment; not only so—masters or men may associate together; but they must not, by their association, violate the law; they must not injure their neighbor; they must not do that which may prejudice another man. The men may take care not to enter into engagements of which they do not approve, but they must not prevent another from doing so. . . . They cannot be permitted to injure their neighbors in carrying out that which they may consider to be a protection to themselves.” The defendants were accordingly found guilty.

Beginning with *In Re Perham*³¹ (1859), however, the element of combination in offenses of this nature ceases to be of primary importance. *Perham* had told certain workmen that if they dared to work for a certain employer, “we shall consider you as blacks, and when we go in we shall strike against you, and strike against you all over London.” He was convicted of endeavoring by threats to compel an employee to leave his services, contrary to 6 George IV, C. 129, Sec. 3, and the conviction was affirmed by the Court of Exchequer.

In the two following cases of *Walsby vs. Anley*³² (1861), and *O'Neill et al. vs. Longman*³³ (1863), the element of combination was invested with a secondary importance which should be noted. The first of these cases grew out of a threat by *Walsby* and thirty others to quit work unless the respondent discharged several men who had signed a “declaration” that they were not and would not become members of a trade union. *Walsby* was accordingly convicted under 6 George IV, C. 129, Sec. 3, of endeavoring by threats to force the respondent to limit the description of his workmen. The Court of Queen’s Bench upheld the conviction. They said that, although a single person might refuse to work unless an obnoxious companion were discharged, yet if a number of employees combined to coerce the master, by the threat of quitting work in a body, to

³¹ 5 H. & N. 30.

³² 3 El. & El. 516.

³³ 4 B. & S. 376.

dismiss the others, such combination would be "illegal," and those taking part in it would be guilty of a threat and a molestation within the statute. In *O'Neill vs. Longman* the appellants, officers of the United Boilermakers and Iron Shipbuilders' Society, told Longman that unless he left the service of Kruger, Dannott & Co., who were permitting "encroachments," he would be expelled from the union, his name would be published in the list of expelled members and sent all around the country, and he would be despised and "put to all sorts of inconveniences." The appellants were convicted under 6 George IV, C. 129, Sec. 3, of "by threats and intimidation endeavoring to force Longman to depart from his employment." The Court of Queen's Bench confirmed the conviction, upon the authority of *Walsby vs. Anley*. The defendants, said the court, had been guilty of a threat to form an "illegal combination" against Longman: "The society as a body were confederate and agreeing to make a combination to deprive him of his work."

The defendants in these cases had been prosecuted for the statutory offense of endeavoring by threats to coerce the masters, and not for a combination to do anything. The court, nevertheless, having no doubt as to the illegality of the combination in which the defendants were engaged, attributed to it the unlawful character of the threats made. The holding was, in effect, that intimidation under the statute consists in the threat to do something unlawful; and here the unlawful thing contemplated was the formation of an illegal combination. Thus, although the prosecution was for acts done, it was in reality grounded upon the supposed illegality of the combination present. In subsequent cases, however, this theory was abandoned. The effect produced upon the mind of the person threatened with loss was regarded as the essence of the coercion; and the legal or illegal character of any agreement among the persons guilty of the threats was entirely disregarded. This point of view is well illustrated by the case of *Skinner vs. Kitch*³⁴

³⁴ 10 Cox C. C. 493.

(1867). The secretary of the local lodge of the General Union of Carpenters and Joiners sent a letter to Kitch saying that the committee of the society would call his men out unless he would discharge one James Jordan, a non-union man. This was held an offense within the statute, namely, an endeavor by threats to compel Kitch to limit the description of his workmen. Citing the preamble of the statute, Blackburn, J., said: "Now one object of the section is plainly to protect the masters, as in the previous part the Legislature endeavored to protect the workmen. In the second part, I think the great object the Legislature had in view was to protect the masters where it was sought to compel them to limit the description of the workmen they employed to union men; and probably this was the principal object. I certainly think that it is within the words of the act, and plainly within the spirit. It is impossible to read these two clauses without seeing that it is a very beneficial provision, for a greater piece of tyranny than to insist that a master shall have his work stopped unless he consent to punish the men who are his journeymen for refusing to belong to a union cannot well be."⁸⁵ Evidently the legality vel non of the combination was not regarded as an issue in the case.

It may be noted at this point that the last case in which a combination among workmen was indicted as a conspiracy was *Reg. vs. Hibbert et al.*⁸⁶ (1875). From that time punishment has been inflicted for acts done in contravention of the statutes. After 1867 it was generally considered that the threat to strike, or to order a strike, for the purpose of forcing the discharge of non-union men, etc., was an unlawful threat within the meaning of the Act 6 George IV, C. 129, Sec. 3. It was held in *Gibson vs. Lawson* and in *Curran vs. Treleven*,⁸⁷ decided in 1891, that the Act of 1875, C. 86, had changed the law in this respect. In the first of these cases the respondent had been summoned for

⁸⁵ See also *Shelbourne vs. Oliver* (1866), 13 L. T. N. S. 630.

⁸⁶ 13 Cox C. C. 82.

⁸⁷ 61 L. J. M. C. 9.

an offense under section 7 of the act. As a shop delegate of the Amalgamated Society of Engineers he had informed Palmer & Co., in pursuance of a resolution of the Society, that all members would quit work unless the appellant (also an employee of Palmer & Co.) would give up his membership in the National Society of Engineers and join the Amalgamated. As a result, the appellant was discharged. Similarly, in *Curran vs. Treleaven*, the appellant, as secretary of the National Union of Gasworkers and General Laborers, had called a strike to compel Treleaven to discharge certain non-union men. The Supreme Court of Judicature held that these acts did not constitute "intimidation" in the sense in which the term is employed in section 7 of the Act of 1875. In *Gibson vs. Lawson, Cole-ridge, C. J.*, said that acts not indictable under that statute "are not now, if indeed they ever were, indictable at common law." In both cases the court intimated that "intimidation" means "a threat of personal violence."

As we review this series of decisions, in the endeavor to determine whether they broaden the scope of the crime of conspiracy, we find that *Reg. vs. Hewitt et al.* alone raises any real question. In that case Lord Campbell apparently based the illegality of the combination squarely upon the fact that its purpose was to inflict damage upon a third person. As no illegal means were contemplated, Lord Campbell evidently regarded the object as illegal because it was oppressive and hurtful in its actual effect upon that person. Such a conclusion was not supported by the preceding authorities.

In respect to *Reg. vs. Hewitt*, however, we may point out that it was never followed in the later decisions. On the contrary, as has been shown, the element of combination in similar cases was first relegated to a subordinate position, and was shortly afterward eliminated altogether. The courts soon came to observe that the acts done might be construed as violations of the statute. Naturally the judges chose this method of protecting masters and non-union men in preference to stretching out of all semblance

of certainty the already too shadowy principles relating to criminal conspiracy. Lord Campbell, therefore, correctly voiced the judicial policy of the period in declaring criminal the actions charged, but the reasons which he adduced in support of his decision were different from those subsequently adopted.

Walsby vs. Anley and *O'Neill vs. Longman* are seen, upon close examination, not to be in conflict with the general law of conspiracy. In the first place, the statements by the court that these combinations were "illegal" were really not necessary. The indictments had charged, not conspiracies, but the statutory crime of having attempted by threats to coerce. The courts needed only to have held broadly, as was done in subsequent cases, that the acts proved constituted intimidation. But even if the judges had said that the same acts done by a single individual would not amount to a threat, they would not thereby have enlarged the legal conception of conspiracy. Such a statement would only mean that the intimation of an intention to employ concerted action would have a coercive effect which the threat of individual action could not produce. But this undoubted truth does not necessarily involve the assertion that the mere combination to effect the particular purpose in view is in itself a criminal act.

Again, the combinations were said to be "illegal." But they might be "illegal" without being at the same time "criminal."

In *Rex vs. Bykerdyke*, however, such a combination appears to have been held indictable. Remembering this, and assuming also that the courts in *Walsby vs. Anley* and in the later cases intended to declare that these combinations were still criminal, let us inquire whether the latter really fall outside of Lord Denman's antithesis.

The Anti-Combination Laws of George III were currently regarded as being in affirmance of the common law of conspiracy, and it was generally thought that the combinations thereby prohibited were criminal quite apart from the statute declaring them so. The Acts of 5 and 6 George

IV testify to a change of Parliamentary policy in respect to labor combinations. But the courts still looked with unfriendly eyes upon agreements among workmen in furtherance of trade disputes. This feeling of hostility was reflected in the judicial interpretations of the Act of 6 George IV, C. 129. It was repeatedly declared that this act, by repealing former statutes, had revived the common law relating to combinations of labor. But at common law, the judges said, all such combinations were illegal and criminal. Hence, a special statutory exemption was necessary to legalize any combination among workmen to advance their interests by the peculiar methods usually employed by them for that purpose. Now the Act of 6 George IV, C. 129, expressly legalized only combinations to advance wages, etc. Combinations for any other object, therefore, remained criminal by the common law; and since combinations to compel by threat of strike the discharge of other workmen, etc., were not in terms declared lawful, they were still regarded as criminal, in spite of the Act of 6 George IV.

The above view plainly inspired the decision of Patteson, J., in *Rex vs. Bykerdyke*³⁸ (1832). It was expressly announced by Crompton, J., in *Hilton vs. Eckersley*³⁹ (1855); and although Lord Campbell in the same case expressed the opinion that combinations to raise wages were not criminal at common law, the later cases proceeded upon the other theory. Thus, Crompton, J., in *Walsby vs. Anley*,⁴⁰ said: "Statute 6 George IV, C. 129, by repealing all the previous statutes on the subject, appears to me to have reestablished the common law as affecting combinations of masters or workmen. I adhere to the opinion that, at common law, all such combinations are illegal. . . . That being so, it was necessary, by sections 4 and 5 of the statute, to render legal the combinations therein referred to respectively, and which would, at common law, have been illegal."

³⁸ 1 Moo. & R. 179.

³⁹ 6 El. & El. 47.

⁴⁰ 3 El. & El. 516.

Whence it followed that since the combination then before him did not fall within the protection of those sections, it remained illegal. Likewise, Brett, J., in *Reg. vs. Bunn*⁴¹ (1872), ruled that the Act of 1871 had not affected the common law of conspiracy, except as to matters expressly provided for. This case was criticized by Coleridge, C. J., in *Gibson vs. Lawson*⁴² (1891), who laid down the principle in respect to the Act of 1875 that acts not indictable under that statute "are not now, if indeed they ever were, indictable at common law." But the former view recurred in *Lyons vs. Wilkins*⁴³ (1898). Smith, L. J., stated that the Acts of 1871 and 1875 had legalized certain otherwise illegal acts, and that as the acts complained of did not come within the statutes, they remained illegal.

Thus it appears that the weight of authority is upon the side of the principle that combinations among workmen to dictate to their master whom he should employ were illegal and criminal at common law, and had not been rendered legal by the Act of 6 George IV, C. 129.

This brings us to the essential point in our inquiry. Why were combinations of the above character illegal at common law? There is some evidence of a judicial opinion that the means—namely, strikes—to be employed for accomplishing the purpose of the combination should be regarded as unlawful. For example, Blackburn, J., in *Hornby vs. Close*⁴⁴ (1867), said: "Further, I think this society is constituted for an illegal purpose. . . . The Justices have found, and were justified in finding, that the object of this society was to encourage strikes." This view recurs as late as 1898. In *Lyons vs. Wilkins*, decided by the Court of Appeal, Smith, L. J., said, "Prior to that date [1871] I do not think there can be a doubt that a strike or a picket would have been illegal." Kay, L. J., expressed the same opinion, and then added, "The combination of a number

⁴¹ 12 Cox C. C. 316.

⁴² 61 L. J. M. C. 9, 16.

⁴³ 65 L. J. Ch. 601, 611.

⁴⁴ 8 B. & S. 175, 183.

of persons to induce and encourage and bring about a strike would also have been an illegal act."

But the real reason for this hostility on the part of the courts was more fundamental. We find little difficulty in attributing the illegality of combinations to strike or otherwise to advance the interests of labor, not to the material loss inflicted upon the employer concerned, but to the harm supposed to result from their activities to the public at large. The theory that such combinations worked injury to the community as a whole was thoroughly in accord with the trend of political and economic thought until the end of the first third of the nineteenth century. Old Toryism regarded all combinations with a dread springing from a lively remembrance of the Reign of Terror in France.⁴⁵ At a later period economic thought confirmed this vague distrust of combinations of workmen by adducing the Wage Fund Theory, which taught that labor could not, by any effort of its own, secure a larger share of the fruits of production than the natural play of industrial forces would automatically set aside as a fund for its recompense. From this it would follow that the disturbance and loss caused by strikes were unmitigated evils, since not even the workmen themselves were benefited by the ruin which they brought upon the business community.

The change in the legislative policy of England toward industrial combinations did not, as we have seen, procure for organized labor the favor of the courts; and their enmity, based largely upon the above elements, found modern expression in the doctrine that such combinations were "illegal" because in "restraint of trade." This principle received its first explicit statement in *Rex vs. Marks et al.*,⁴⁶ decided in 1802. Comparing combinations to promote mutiny and sedition with an association of workmen formed for the purposes of regulating wages and of compelling other journeymen to join it, Lawrence, J., said: "Combinations formed for such purposes are undoubtedly highly prej-

⁴⁵ Dicey, "Law and Opinion in England," p. 100.

⁴⁶ 3 East 157.

udicial to the State, and might be the primary object of the attention of the legislature; but I cannot say that combinations like this, which strike at the root of the trade of the kingdom, may not be, though not so immediately, yet ultimately, as mischievous in their consequences, and in the event beget a danger to the State itself, to an extent beyond the power of the government to repress."

As long as the courts assumed that labor combinations were economically harmful, the restraint of trade doctrine so announced was never judicially questioned. But as time went on, the arguments of those who contended that trade unions had a sound economic justification began to attract attention and gain support. The result was the introduction of an element of doubt into the minds of the judges as to the validity of the restraint of trade doctrine in its application to trade unions; a doubt which divided the Court of Queen's Bench in 1869, and led to the annulment of the doctrine, in so far as it raised a criminal liability, by act of Parliament. This line of development can be traced through a trio of leading cases, covering the period from 1855 to 1869, and culminating in the Act of 34 and 35 Victoria, C. 31, passed in 1871.

The first of these cases was *Hilton vs. Eckersley*.⁴ The question was as to the legality of a bond entered into by a number of mill-owners providing for concerted action against certain combinations of workmen. The Court of Queen's Bench held the bond void as against public policy. Crompton, J., said (p. 52): "I think that combinations like those disclosed in the pleadings in this case were illegal and indictable at common law, as tending directly to impede and interfere with the free course of trade and manufacture. . . . Combinations of this nature, whether on the part of workmen to increase or of masters to lower wages were equally illegal." The words of Lord Campbell, however, show the influence of advancing economic thought: "I enter upon such consideration with much reluctance and

⁴ 6 El. and El. 47 (1855).

with great apprehension, when I think how different generations of Judges, and different Judges of the same generation, have differed in opinion upon questions of political economy, and other topics connected with the adjudication of such cases." But he finally said: "When I look at this bond, I have no hesitation in concluding that the association which it establishes ought not to be permitted, and that the enforcing of the bond will produce public mischief. I, therefore, feel compelled, as a Judge, to declare that it is void." The Court of Exchequer Chamber affirmed the judgment that the bond was illegal as in restraint of trade.

So much of this opinion as applied to labor combinations was, of course, obiter dictum. But the views therein expressed were approved a dozen years later in the case of *Hornby vs. Close*,⁴⁶ which was directly in point. The defendant had been accused of embezzling the funds of the Bradford Branch of the United Order of Boilermakers and Iron Shipbuilders. The facts were proved, but the defendant urged that he should not be punished for the reason that the Order was not entitled to protection as a friendly society under Stat. 18 and 19 Victoria, C. 63, and for the further reason that it was illegal and in restraint of trade. The Court of Queen's Bench unanimously accepted this view, holding that the objects of the Society, as disclosed by its rules, were those of a trade union. Cockburn, C. J., cited at length *Hilton vs. Eckersley*, and concluded, "So the rules of this Society are in restraint of trade, and consequently illegal by the law of the land." Blackburn, J., thought that "this Society is constituted for an illegal purpose," namely, "to encourage strikes." Mellor and Lush, JJ., concurred, holding that the Society was in effect a trade union, and hence illegal. All expressly declined to state whether the combination could be prosecuted as a criminal conspiracy.

The practical hardship worked by the principle laid down in this celebrated case lent added force to the unionists'

⁴⁶ 8 B. & S. 175 (1867).

arguments, and the influence exerted upon the minds of the judges by economic discussion upon the subject of labor combinations is strikingly shown by the language used in the case of *Farrer vs. Close*,⁴⁹ decided in 1869. The facts were identical with those in *Hornby vs. Close*. The defendant, charged with the embezzlement of the funds of the Amalgamated Society of Carpenters and Joiners, had been released by the justices of the peace because they considered that the Society was a trade union and illegal. Its rules, proved in evidence, made provision for strikes and strike benefits. Upon appeal to the Court of Queen's Bench, Cockburn, C. J., with whom Mellor, J., concurred, took the narrow ground that this case came within the principle of *Hilton vs. Eckersley and Hornby vs. Close*. He held that as the purposes of the Society were those of a union it was not entitled to protection. The policy of the law laid down in these cases he declined to discuss. He admitted that the unions had found defenders, but added: "It must not, however, be forgotten that while some strikes may be perfectly justifiable to enforce honest and just demands, others may be resorted to in order to extort unreasonable exactions or enforce tyrannical rules, and the only corrective against such attempts is to be found in the freedom of the labor market, which it is the purpose of these combinations to prevent."

Hannen, J., warmly disagreed with the Chief Justice. He denied that either the rules or the interpretation put upon them in practice showed an illegal object on the part of the Society, unless it were held that a strike is always illegal; and this he would not allow. Of the rule providing that striking members should be sent to other localities, he said: "The tendency of this undoubtedly is to support and maintain the strike for a longer time, and so to increase the chance of the men obtaining the object of the strike. This, it is alleged, is in restraint of trade, that is, it disturbs the course and postpones the effect of competition among the men, which, if left to itself, might sooner compel them to

⁴⁹ 10 B. & S. 553.

return to work; and, therefore, it is contended, is contrary to public policy. I think that our judgment ought not to be based on this line of argument. By the expression contrary to public policy, I understand it is meant that it is opposed to the welfare of the community at large. I can see that the maintenance of strikes may be against the interests of employers, because they may be thereby forced to yield at their own expense a larger share of profits or other advantages to the employed, but I have no means of judicially determining that it is contrary to the interests of the whole community, and I think that, in deciding that it is, and therefore that any act done in its furtherance is illegal, we should be basing our judgment not on recognized legal principles, but on the opinion of one of the contending schools of political economists." Hayes, J., "without professing to know much of what is public policy on this subject at the present time," agreed with Hannen; so, the court being equally divided, the appeal dropped.

Here the court broke away from its former position that trade unions are obviously without economic justification. The doctrine of restraint of trade as formerly applied was sharply attacked by two of the judges; and those who upheld it made little attempt to justify it, being content with saying merely that they were bound by the law as laid down in former cases. Under these circumstances we need feel no surprise at the provision in the Act of 1871 (C. 31, Sec. 2) already referred to: "The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise."

The foregoing history of the doctrine of restraint of trade enables us to see very clearly that in holding illegal all labor combinations not legalized by statute the courts were but applying the old principle that a combination to do that which amounts to a public injury is a conspiracy. From this it would follow that combinations to compel an employer

by strike to limit the description of his employees fell within the terms of Lord Denman's antithesis.

The above facts, therefore, warrant the conclusion that at no time has the law of England ever denounced as a criminal conspiracy any combination whose purpose, remote or primary, was not considered as being in itself clearly unlawful.

But this conclusion standing alone is not a complete description of the legal status of combinations among workmen in England. The attitude of the criminal courts toward them can be easily accounted for by a reference to the statutes, especially the Act of 1875. This act, by providing that a combination to do any act in furtherance of a trade dispute shall not be punishable as a conspiracy "if the same act committed by one person would not be punishable as a crime," clearly renders impossible any expansion by the courts of the orthodox definition of criminal conspiracy in connection with industrial combinations. At the same time, the statute forbade the employment, by single persons or by combinations, of a number of the more violent and oppressive methods usually resorted to by striking workmen. Thus ample criminal remedies against labor combinations have been supplied through ordinary channels, and the courts have consequently been relieved of the necessity of extending the scope of conspiracy in order to restrain the more flagrant acts of labor unions.

It seems certain, however, that the courts in England as elsewhere would be inclined to take all needful measures to protect employers and non-union men against undue oppressions whatever might be the nature of the specific acts done for the purpose. No amount of theorizing in regard to the inconsistency of punishing two men for agreeing to do that which a single individual may do with impunity will avail so long as public opinion refuses to tolerate the infliction upon a third person without just excuse of the peculiar hurt which only a number of persons acting in combination can inflict. The current morality brands such conduct as

wrong; and its judgment cannot be warped by lengthy discussions as to the legality or illegality per se of the methods employed. In defending the weaker person against aggression on the part of combinations of persons the courts have preferred, where possible, to do so without express reference to the element of combination present. When it has appeared necessary, however, they have not feared to assert openly that in some cases the fact of combination raises a liability where before, perhaps, no liability existed.

The above statements find ample confirmation in the history of the element of combination in civil cases. This is closely bound up with certain doctrines relating to malice and justification, a brief account of which must first be given.

After the passage of the Act of 6 George IV, C. 129, legalizing agreements to strike for certain enumerated purposes, the opinion began to find currency that the lawfulness vel non of combinations of labor in general depended upon their real object. This view first appeared in *Reg. vs. Rowlands*⁵⁰ (1851). Speaking of a combination among workmen and others to obtain an increase of wages, Erle, J., said: "I consider the law to be clear only to that point—while the purpose of the combination is to obtain a benefit for the parties who combine—a benefit which by law they can claim. I make that remark, because a combination for the purpose of injuring another is at once a combination of an entirely personal nature, and the law allowing them to combine for the purpose of obtaining a lawful benefit to themselves, gives no sanction to combinations which have for their immediate purpose the injury or hurt of another." The same principle was stated, though without mention of the element of combination, in *Farrer vs. Close*⁵¹ (1869). Hannen, J., said that the legality or illegality of a strike "must depend on the means by which it is enforced, and on its objects." It may be criminal, or illegal, "or it may be perfectly innocent, as if it be the result of the voluntary

⁵⁰ 5 Cox C. C. 436, 460.

⁵¹ 10 B. & S. 553, 566.

combination of the men for the purpose only of benefiting themselves by raising their wages, or for the purpose of compelling the fulfillment of an engagement entered into between employers and employed, or any other lawful purpose."⁵²

Now when cases grounded upon acts done or threatened by combinations of labor began to find their way into the civil courts, the doctrine of justification was called upon to play an important part in fixing the liability of the defendants. The doctrine began to develop that certain acts causing damage would be actionable if done for a purely malicious purpose, whereas the same acts would not give rise to liability if a legal justification could be shown. The most influential cases upon this point were *Temperton vs. Russell*⁵³ (1893) and the *Mogul Steamship Co. vs. McGregor*⁵⁴ (1892). The views therein expressed took root, and for a time seemed destined to attain prominence in the field of labor law. Thus in *Curran vs. Trealeaven*⁵⁵ (1891), wherein it was held that a strike to cause the discharge of non-union men was not intimidation within the terms of the Act of 1875, section 7, it was intimated that had the proof shown a "malicious conspiracy" to injure, or "malice in fact," the acts of the defendants might have been indictable and actionable. In *Trollope vs. London Building Trades Federation*⁵⁶ (1895) an injunction was granted against the black-listing of certain non-union men and non-strikers, upon the authority of the *Mogul Case*. Kekewich, J., said: "Their own benefit was, of course, one of the objects of their action, and it was to some extent—to use a philosophical expression—the 'final cause' of their action. But it was not the only cause, and I have no doubt from the evidence before me that another motive and the principal and primary motive, was to injure the workmen mentioned in the 'Black-

⁵² See also *Swaine vs. Wilson*, 24 Q. B. D. 252 (1889); *Sheridan's Case* (1868), *Wright on Conspiracy*, 38.

⁵³ 62 L. J. Q. B. 412; (1893) 1 Q. B. 715.

⁵⁴ 61 L. J. Q. B. 295; 58 L. J. Q. B. 465; (1892) A. C. 25.

⁵⁵ 61 L. J. M. C. 9.

⁵⁶ 72 L. T. 342.

List' and also Messrs. Trollope and Sons, and to prevent them from carrying on their lawful trade or business with that freedom which is the privilege of Englishmen. That seems to me to be the direct object of the defendants' procedure, and is therefore, according to Lord Field, actionable." In *Lyons vs. Wilkins*⁶⁷ (1898), North, J., granted a preliminary injunction restraining the defendants "from maliciously inducing or conspiring to induce persons not to enter into contracts with the plaintiffs." He said, "If you have to forward your own interest by destroying the rights of others, it seems to me that that is express malice." This portion of the injunction, however, was stricken out after the decision of *Allen vs. Flood*⁶⁸ (1898), the reason, as stated by Byrne, J.,⁶⁹ being that "it was conceded by the plaintiffs that they could not succeed unless they could show malice; and it is the law, as finally determined by the House of Lords, that the existence of a malicious motive cannot in such a case as this render unlawful an act or acts otherwise lawful."

The above doctrines were such as to enable the courts to interfere upon the ground of malice with many acts deriving their formidable character from the numbers engaged in them, without express reference to the element of combination itself. But the decision in *Allen vs. Flood* that a malicious motive cannot transform an otherwise legal act into an actionable wrong closed this avenue of redress. The result was the unanimous holding by the House of Lords in *Quinn vs. Leathem* that the wrongful and malicious inducement, by persons acting in concert, of the plaintiff's customers and servants to cease dealing with him, was actionable, in spite of the decision of *Allen vs. Flood*. One of the distinctions drawn between the two cases was the fact that the present case was characterized by the element of conspiracy, which had been lacking in the earlier case. Several of the judges expressly stated that an individual may do

⁶⁷ 65 L. J. Ch. 601, 604.

⁶⁸ 77 L. T. Rep. N. S. 717.

⁶⁹ 67 L. J. Ch. 383, 385.

certain acts which a combination may not do, because the effects of concerted action are much more dangerous, coercive, and alarming than those of individual action. A grain of gunpowder is harmless, whereas a pound is destructive.

This principle was approved in the later cases. In *Giblan vs. National Amalgamated Laborers' Union of Great Britain and Ireland*⁶⁰ (1903) it was applied to a combination among trade-union officials to prevent, by calling strikes, a person from obtaining employment. In *South Wales Miners' Federation vs. Glamorgan Coal Co.*⁶¹ (1905), Lord Lindley expressly said: "It is useless to try to conceal the fact that an organized body of men working together can produce results very different from those which can be produced by any individual without assistance. Moreover, laws adapted to individuals not acting in concert with others require modification and extension if they are to be applied with effect to large bodies of persons acting in concert. The English law of conspiracy is based upon and justified by this undeniable truth." The House of Lords, in *Sweeney vs. Coote*⁶² (1907), the latest case involving combination brought before it, was careful to decide only that the evidence was not sufficient to support the allegation of a conspiracy to injure the appellant in her business and employment. The Earl of Halsbury went so far as to intimate that the case might be otherwise with a combination to procure her dismissal on account of personal objections, ill-will or spite.

The result of these and other cases⁶³ was an agitation by

⁶⁰ Court of Appeal (1903), 2 K. B. 600.

⁶¹ 74 L. J. K. B. 525. House of Lords.

⁶² (1907) A. C. 221.

⁶³ It had been decided in *Lumley vs. Gye*, 22 L. J. Q. B. 463 (1853), that maliciously inducing a breach of contract was actionable. This case was approved in *Quinn vs. Leathem*, in *Read vs. Friendly Society of Operative Stone Masons*, 71 L. J. K. B. 994 (1902), and in *South Wales Miners' Federation vs. Glamorgan Coal Co.*, 74 L. J. K. B. 525 (1905), in which it was also said that the absence of ill-will was no justification. The matter is dealt with in the *Trades Disputes Act, 1906*, in these words (sec. 3): "An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to

trade unionists which led to the passage of the Trades Disputes Act, 1906, 6 Edward VII, C. 47. In this act the attempt is made to reverse the principles laid down by the courts in a number of previous decisions in which they had endeavored to protect non-union men and employers from undue interference by the unions. That liability should arise from concerted action is negatived in these words (sec. 1): "An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable."

This statute is the culmination of the attempts made by the legislature in England to deal with acts done in the course of the struggle between capital and labor, without regard to the element of combination. How it will be judicially interpreted cannot be foretold, as no case of the proper character has as yet come before the courts. We may venture the opinion, however, that even this act need not have the effect of removing all safeguards against oppressive measures which derive their efficacy from the number of the persons coöperating to employ them. The

break a contract of employment or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labor as he wills."

The latter part of the section is intended to negative certain statements in *Quinn vs. Leatham* and in other cases; especially the decision in *Giblan vs. National Amalgamated Laborers' Union of Great Britain and Ireland* (1903), 2 K. B. 600.

The *Taff Vale Ry. Co. vs. Amalgamated Society of Ry. Servants*, 70 L. J. Q. B. 905 (1901), *Giblan vs. National Amalgamated Laborers' Union*, etc. (supra), *South Wales Miners' Federation vs. Glamorgan Coal Co.* (supra), *Denaby & Cadeby Main Collieries vs. Yorkshire Miners' Assn.*, (1906) A. C. 384, and *Ward, Lock & Co. vs. Operative Printers' Assistants' Society*, 22 T. L. R. 327 (1906), had established that a registered trade union might be held liable like a corporation for its collective acts and for the acts of its officers within the scope of their authority. The Trades Disputes Act, 1906, changed the law in this particular: "Sec. 4—An action against a trade union, whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any court."

courts in the more recent cases have shown a disposition to regard chiefly the nature and effects of the acts done in concert, and to notice the combination only in so far as it invests certain acts with qualities which individual acts do not possess. From this it would follow that if a single person were placed in a position which enabled him to wield the combined powers of a multitude he should be subjected to a proper degree of legal responsibility for his acts. And evidences are not wanting that the courts may take this view. In *Quinn vs. Leathem*⁶⁴ (1902) Lord Robertson said in terms that if one man could have done what the combination did in that case, he would be civilly liable. So in *Giblan vs. National Amalgamated Laborers' Union of Great Britain and Ireland*⁶⁵ (1903), Romer, L. J., expressed the opinion that if one person had the peculiar power and influence to prevent a man from getting work, his conduct in so doing without justification would be an actionable wrong, "such an unjustifiable molestation of the man, such an improper and inexcusable interference with the man's ordinary rights of citizenship as to make that person liable in an action." Now this principle in substance means nothing more than that certain acts of a harmful and coercive character may not be performed without justification either by one person or by a combination of persons. As long as only the results of specific acts are regarded, this position would not be in any way affected by Section 1 of the Trades Disputes Act, 1906, in spite of the undeniable truth that the acts complained of derive their peculiar qualities from the number of the persons who perform them.

It would seem, therefore, that in future trade unionists will be able to secure greater freedom of action against their opponents only by means of statutes expressly legalizing their acts regardless of certain effects produced by them upon other persons. The element of *injuria* must be extracted from the damages inflicted. But this will prove

⁶⁴ 70 L. J. P. C. 95.

⁶⁵ (1903) 2 K. B. 600, 618.

a difficult task as long as the courts are inclined to place restrictions upon the activities of the unions. The judges show a willingness to create new rights in behalf of individuals which may not be infringed by the acts of their enemies in an industrial dispute. Thus, in the Trades Disputes Act, Parliament has been induced to declare that an act done in furtherance of such disputes shall not be actionable "on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business or employment of some other person, or with the right of some other person to dispose of his capital or his labor as he will." Unless the courts change their attitude, however, even this declaration may not be sufficient. They may hold that the acts complained of violate other rights so fundamental (e. g., the "ordinary rights of citizenship") that Parliament might hesitate long before giving to trade unions free leave to disregard them. It appears, therefore, that until the policies and methods of the unions shall have secured a fuller endorsement by public opinion, non-union men and others will continue to enjoy a tolerable degree of protection from at least the more flagrant varieties of interference and oppression on the part of organized labor.

ABBREVIATIONS FOR AUTHORITIES CITED.

A. & E.	Adolphus & Ellis's Reports, King's Bench.
Ad. & E. N. S	Adolphus & Ellis's Reports, King's Bench (New Series).
A. C.	Appeal Cases, House of Lords.
B. & A.	Barnewall & Alderson's Reports, King's Bench.
B. & C.	Barnewall & Cresswell's Reports, King's Bench.
Bell C. C.	Bell's Crown Cases.
B. & S.	Best & Smith's Reports, Queen's Bench.
B. & B.	Broderip & Bingham's Reports, Common Pleas.
Bulst.	Bulstrode's Reports, King's Bench.
Burn's J.	Burn's "Justice of the Peace."
Burr.	Burrow's Reports, King's Bench.
Cald.	Caldecott's Reports, King's Bench.
Camp.	Campbell's Reports, Nisi Prius.
Car. & M.	Carrington & Marshman's Reports.
Car. & P.	Carrington & Payne's Reports, Nisi Prius.
Ch.	Chancery Division.
Chitty.	Chitty's Reports, Bail Court.
Cl. & F.	Clarke & Finnelly's Reports, House of Lords.
Co.	Coke's Reports.
Comyn.	Comyn's Reports, King's Bench and Com- mon Pleas.
Cox C. C.	Cox's Criminal Cases.
Cro. Car.	Croke's Reports, Temp. Charles I, King's Bench and Common Pleas.
Cro. El.	Croke's Reports, Temp. Elizabeth, King's Bench and Common Pleas.
Cro. Jac.	Croke's Reports, Temp. James I, King's Bench and Common Pleas.
D. & M.	Davison & Merivale's Reports, Queen's Bench.
Dears. C. C.	Dearsley's Crown Cases.
Den. C. C. R.	Denison's Crown Cases Reserved.
Dougl.	Douglas's Reports, King's Bench.
D. & R.	Dowling & Ryland's Reports, King's Bench.
East P. C.	East's Pleas of the Crown.
East.	East's Reports, King's Bench.
El. & El.	Ellis & Ellis's Reports, Queen's Bench.
Esp.	Espinasse's Reports or Digest, Nisi Prius.
Fitz.	Fitzherbert's Abridgement of the Law of England.
F. N. B.	Fitzherbert, "De Natura Brevium."
F. & F.	Foster & Finlason's Reports, Nisi Prius.
Gilb., Cases L. & Eq.	Gilbert's Cases in Law and Equity.
Godb.	Godbolt's Reports, King's Bench.

Gouldsb.	Gouldsbrough's Reports, King's Bench.
H. & J.	Harris & Johnson's Reports, Maryland Court of Appeals.
How. S. Tr.	Howell's State Trials.
H. & N.	Hurlestone & Norman's Reports.
Inst.	Coke, Institutes of the Law of England.
Ir. R. Com. Law.	Irish Reports, Common Law Series.
Jones.	Jones's Reports.
Jur.	Jurist Reports in all the Courts.
J. P.	Justice of the Peace.
Keb.	Keble's Reports, King's Bench.
Keilway.	Keilway's Reports, King's Bench.
K. B.	King's Bench, Law Reports.
L. J.	Law Journal.
L. J. N. S.	Law Journal, New Series.
L. J. Ch.	Law Journal, Chancery.
L. J. K. B.	Law Journal, King's Bench.
L. J. M. C.	Law Journal, Magistrates' Cases.
L. J. P. C.	Law Journal, Privy Council Cases.
L. J. Q. B.	Law Journal, Queen's Bench.
L. R. Eq.	Law Reports, Equity Cases.
L. R. H. of L.	Law Reports, House of Lords Cases.
L. R. Ir.	Law Reports, Irish.
L. T.	Law Times.
L. T. R.	Law Times Reports.
L. T. Rep. N. S.	Law Times Reports (New Series).
Leach Cr. L.	Leach's Crown Law.
Leon.	Leonard's Reports, King's Bench.
Lev.	Levinz's Reports, King's Bench.
Lew.	Lewin's Crown Cases.
Lib. Ass.	Liber Assessorum, Temp. Edward III.
Ld. Ken.	Lord Kenyon's Reports, King's Bench.
Ld. Raym.	Lord Raymond's Reports, King's Bench.
M. & S.	Maule & Selwyn's Reports, King's Bench.
Mod.	Modern Reports, King's Bench.
M. & M.	Moody & Malkin's Reports, Nisi Prius.
Moo. & R.	Moody & Robinson's Reports, Nisi Prius.
Moore.	Moore's Reports, King's Bench.
N. & M.	Neville & Manning's Reports, King's Bench.
Palm.	Palmer's Reports, King's Bench.
Q. B. D.	Queen's Bench Division.
Q. B.	Queen's Bench, Law Reports.
Rot. Parl.	Rotulæ Parliamentariæ.
Ry. & M.	Ryan & Moody's Reports, Nisi Prius.
Salk.	Salkeld's Reports, King's Bench.
Saund.	Saunders' Reports, King's Bench.
Sayer.	Sayer's Reports, King's Bench.
Show.	Shower's Reports, King's Bench.
Sid.	Siderfin's Reports, King's Bench.
Starkie.	Starkie's Reports, Nisi Prius.
St. at L.	Statutes at Large, Great Britain.
Stra.	Strange's Reports, King's Bench.
Styles.	Styles' Reports, King's Bench.
Sw. & Tr.	Swabey & Tristram's Reports.
T. Jones.	T. Jones's Reports, King's Bench.
T. Raym.	T. Raymond's Reports.

T. & N. Cr. C.	Temple & New's Criminal Cases.
T. L. R.	The Times' Law Reports.
T. R.	Term Reports (Durnford & East), King's Bench.
Vent.	Ventris' Reports, King's Bench.
Ves.	Vesey's Senior Reports, Chancery.
Ves. & B.	Vesey & Beame's Reports, Chancery.
W. Bl.	W. Blackstone's Reports.
Willes.	Willes' Reports, King's Bench and Common Pleas.
Wils.	Wilson's Reports, King's Bench and Common Pleas.
Y. B.	Year Book.
Yelv.	Yelverton's Reports, King's Bench.

VITA.

The author was born in Cambridge, Dorchester County, Md., February 27, 1884. His parents having removed to Baltimore when he was but two years of age, his education has been pursued wholly in that city. He received his preliminary training in the public schools, and was prepared for college at the Baltimore City College and Marston's University School.

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